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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SIOUX NATION OF INDIANS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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v.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, 1a-70a) is reported at 601 F.2d 1157 (1979).

JURISDICTION

The opinion of the Court of Claims, determining liability against the United States, was filed on June 13, 1979 (App. A, *infra*, 1a-70a). On July 31, 1979, a

final judgment against the United States was entered (App. B, *infra*, 71a-73a). On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether legislation which divests an Indian tribe of a portion of its lands in consideration of an undertaking to provide material assistance and food rations as long as needed amounts to a "taking" under the Just Compensation Clause of the Fifth Amendment so as to entitle the tribe to interest on a later award for the value of the lands.

STATUTORY PROVISION INVOLVED

The Act of February 28, 1877, ch. 72, 19 Stat. 254, provides in pertinent part:

> That a certain agreement * * * is hereby ratified and confirmed * * *.
>
> *Article 1.* The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows * * * and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all

> privileges of hunting; and article 16 of said treaty is hereby abrogated.
>
> * * * * *
>
> *Article 5.* In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual * * *. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. * * * The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

STATEMENT

1. Respondents, several tribes included within the Sioux Nation of Indians, seek to recover just compensation, together with interest from 1877, for an alleged Fifth Amendment taking by the United States, when, in that year, Congress removed approximately seven million acres (including the gold-rich Black Hills) from the Great Sioux Reservation.

By virtue of the Treaty of April 29, 1868, with the Sioux Indians, 15 Stat. 635, 636, the United States had assured that this Reservation, including the land removed from it in 1877, would be "for the absolute and undisturbed use and occupation of the Indians." The Act of February 28, 1877, ch. 72, 19 Stat. 254, 256, which removed the seven million acres in question,[1] promised to provide the Sioux with specified rations "until the Indians are able to support themselves."[2] Subsequently, rations valued at approximately $43 million were provided (App. A, *infra*, 9a, 13a).

The removal of the Black Hills from the Sioux Reservation has been the subject of litigation in the

[1] In addition, the Act redefined the boundaries of the Great Sioux Reservation, giving the Indians approximately 900,000 acres of land they had not previously had (see App. A, *infra*, 13a n.3). By virtue of this 1877 Act, the United States also acquired three rights-of-way for wagon roads through the Reservation and abrogated Sioux hunting rights outside the Reservation. Although the 1877 Act is phrased as an agreement, that agreement was never ratified by the requisite number of Sioux, as provided in Article XII of the Treaty of April 29, 1868, 15 Stat. 639.

[2] The removal of the Black Hills from the Great Sioux Reservation by the United States followed upon a period of increasing friction in the area between Indians and non-Indians during which time non-Indian miners repeatedly entered upon these lands in hopes of extracting gold reported to exist in the vicinity, and Lt. Colonel George Custer was defeated at the Battle of the Little Big Horn. These historical events are more fully described in the opinion of the Court of Claims in this case (App. A, *infra*, 5a-7a), and in its 1942 decision which initially rejected the Sioux Nation's claim, *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

Court of Claims on a number of occasions in the past 37 years. The claim that this removal constituted a Fifth Amendment taking of tribal land was first raised in that court pursuant to a special jurisdictional act[3] in 1942. The Court of Claims held at that time that, under the doctrine of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), no Fifth Amendment taking had occurred. *Sioux Tribe of Indians v. United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943).

Following enactment of the Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, a second round of litigation was commenced by respondents before the Indian Claims Commission.[4] The Indian Claims Commission ultimately held that the 1877 Act had effected a Fifth Amendment taking, and awarded as just compensation more than $17 million, indicating that accrued interest at the rate of 5% per annum would also be charged against the United States. 33 Ind. Cl. Comm. 151, 221, 362-363

[3] Act of June 3, 1920, ch. 222, 41 Stat. 738.

[4] The Indian Claims Commission initially held that no claim for dishonorable dealings or unconscionable conduct had been proved. 2 Ind. Cl. Comm. 646 (1954). The Court of Claims affirmed. 146 F. Supp. 229 (1956). In 1957, the Sioux moved for a new trial, claiming inadequacy of prior counsel, and requested that the Court of Claims vacate its 1956 judgment of affirmance and remand for reconsideration based on both the existing record and such additional proof as might be offered. In 1958, the Court of Claims granted the motion in part, remanding to the Indian Claims Commission for a determination whether the record should be reopened. See 182 Ct. Cl. 912 (1968). See also *Sioux Tribe* v. *United States*, 500 F.2d 458, 475-477 (Ct. Cl. 1974). It was.

(1974). The Court of Claims held that the Commission's finding of a Fifth Amendment taking was barred by the Court of Claims' 1942 decision as *res judicata*. Nevertheless, it held that the Sioux were entitled to recover the principal amount of the Commission's award without interest. *United States* v. *Sioux Nation*, 518 F.2d 1298 (Ct. Cl.), cert. denied, 423 U.S. 1016 (1975).

In 1978, however, Congress amended Section 20(b) of the Indian Claims Commission Act of 1946, 25 U.S.C. 70s(b), so as to direct the Court of Claims to review the merits of the 1974 Indian Claims Commission decision without regard to the defense of *res judicata* or collateral estoppel. Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153.[5] The judgment now presented to this Court results from that review.

The Court of Claims, sitting en banc, held, over two dissents, that the United States was liable for a Fifth Amendment taking in connection with the removal of the Black Hills portion from the Great Sioux Reservation. This was exactly opposite to the conclusion reached by the court in its 1942 decision on the same record and on the same Supreme Court precedents. In reaching this new conclusion, the Court of Claims reasoned that Congress had not acted in good faith to give the Indians the full value

[5] Final judgment was not entered following the 1975 decision of the Court of Claims pending further proceedings before the Indian Claims Commission. The Act of March 13, 1978, then intervened, opening the question whether a taking had been effected necessitating the payment of interest. No payment pursuant to the court's 1975 decision has been made.

of their land (App. A, *infra*, 25a-28a).[6] It stated that *Lone Wolf* v. *Hitchcock*, *supra*, was not controlling precedent because this Court, in that case, had not reached the question whether enactment of legislation appropriating Indian lands in return for specified compensation constituted a taking for purposes of the Fifth Amendment (App. A, *infra*, 28a-33a).[7] Hav-

[6] Although the Black Hills portion of the Reservation was valued at approximately $17 million and approximately $43 million had been expended to provide the promised rations (App. A, *infra*, 2a, 13a), Congress specifically provided in 1974 that no offset could be claimed for these expenditures. Indian Claims Commission Act of 1946, 25 U.S.C. 70a, as amended by Act of October 27, 1974, Pub. L. No. 93-494, 88 Stat. 1499. The Court of Claims held, contrary to respondents' contentions, that the 1974 legislation did not bar judicial consideration of these federal expenditures for purposes of making the threshold determination of whether the Sioux were entitled to recover for a Fifth Amendment taking (App. A, *infra*, 14a-15a n.4).

[7] Judge Nichols, concurring, joined on this point by Judges Bennett and Kunzig, dissenting, questioned this analysis, reasoning that although the Indian plaintiffs in *Lone Wolf* had stated a claim under the Fifth Amendment, they had sought only declaratory and injunctive relief, rather than compensation, because of the limits on jurisdiction over claims by Indians in effect at the time (App. A, *infra*, 40a-44a, 49a-54a). See Act of March 3, 1863, ch. 92, 12 Stat. 767; H.R. Rep. No. 1466, 79th Cong., 1st Sess. 2 (1945); Hoyt, *Jurisdiction of the Court of Claims*, 115 Ct. Cl. xxi, xxvii (1950). While the Sioux and certain other tribes were at times allowed to sue by virtue of special legislation granting jurisdiction over particular claims of those tribes, it was not until more than 40 years after the decision in *Lone Wolf* that Congress enacted legislation providing more generally for recovery on Indian claims. See Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.*; 28 U.S.C. 1505, as added by Section 89(a) of the Act of May 24, 1949, ch. 139, 63 Stat. 102.

ing found that a Fifth Amendment taking had occurred, the Court of Claims held that the United States would be liable, not only for the value of the property taken, but also for interest from the date of taking, February 28, 1877 (App. A, *infra*, 2a, 33a, 39a).

A final judgment in the amount of $17,553,484, plus interest at 5% per annum on the sum of $17,103,484 of said amount, was accordingly entered (App. B, *infra*, 73a).[8] The present petition challenges only the award of interest.

REASONS FOR GRANTING THE PETITION

The decision of the Court of Claims is inconsistent with this Court's ruling in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), disregards its own precedents, and unduly restricts congressional power to manage Indian property. The result is an award of more than $105 million which represents a substantial and unwarranted charge against the public fisc and invites like awards in other pending cases.

1. It has long been settled that, under certain conditions, Congress unilaterally may divest an Indian tribe of a part of its lands, even in derogation of an earlier treaty, without exercising the power of

[8] The Court of Claims reversed the decision of the Indian Claims Commission insofar as the Commission had held that the United States was liable for a Fifth Amendment taking in connection with the removal by miners of gold valued at $450,000 from the Black Hills prior to the enactment of the 1877 legislation. Accordingly, the Court of Claims determined that interest at the rate of 5% per annum would be payable only on the sum of $17,103,484 (App. B, *infra*, 73a).

eminent domain. In such circumstances, if inadequate consideration was paid for the lands, the Indian Claims Commission Act of 1946 (25 U.S.C. 70a) permits the Tribe to recover the net deficiency, but without interest. On the other hand, it is equally well settled that some appropriations of Indian land amount to a "taking" within the meaning of the Just Compensation Clause of the Fifth Amendment, in which event the Tribe is entitled to recover the value of the property at the time of taking plus interest to the date of payment. The question presented in this case is how we determine which is which.

a. Until the present decision, it was generally accepted that the definitive answer had been given by this Court in *Lone Wolf* v. *Hitchcock*, *supra*. It was there held that whenever the operative statute "purport[s] to give an adequate consideration" for the lands appropriated, the courts "must presume that Congress acted in perfect good faith * * * exercis[ing] its best judgment" in effecting "a mere change in the form of investment of Indian tribal property," and that, in those circumstances, "the judiciary cannot question or inquire into the motives which prompted the enactment of [the] legislation." 187 U.S. at 568. If that standard had been followed here, it seems obvious the Tribe's "taking" claim must have been rejected. For, on its face, the Act of 1877 (*supra*, pages 2-3) purports to ratify a consensual "agreement" which expressly recites governmental undertakings to provide various forms of assistance,

including a specific promise of "subsistence" rations, "[*i*]*n consideration* of the [previously described] cession of territory and rights." Indeed, this is precisely the rationale of the 1942 decision of the Court of Claims, denying the very claim asserted here. *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 670 (1942), cert. denied, 318 U.S. 789 (1943).

On this occasion, the Court of Claims sought to avoid the controlling precedent of *Lone Wolf* by giving that decision an artificially narrow reading. In effect, the majority construed *Lone Wolf* as irrelevant to a claim for just compensation (App. A, *infra*, 28a-33a). Yet, as the court itself noted (*id.* at 31a n.6), the Indians in that case "were arguing that the Court should prevent actions which, [they] believed, would result in an unconstitutional taking *if* not promptly enjoined." Since the Indians then had no remedy at law to obtain just compensation, the Court, it seems to us, had to conclude that the challenged statute would work no unconstitutional taking, else an injunction would have issued. See *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919). In this respect, we believe Judge Nichols, concurring (App. A, *infra*, 39a-48a), and Judges Bennett and Kunzig, dissenting (*id.* at 48a-53a), have the better of the argument.

b. But even if *Lone Wolf* be laid aside as inapplicable, the decision below would encounter other obstacles. The Court of Claims has now reversed the presumption, attributing bad faith to Congress simply because it failed expressly to say that it was giving fair value for the lands appropriated—albeit

it never suggested that it was not doing so, and, as it turned out, was in fact overgenerous. See App. A, *infra*, 13a, 25a-28a.[9] With one questionable exception, this is unprecedented in the jurisprudence of both this Court and the Court of Claims.

In this Court, the only decisions concluding that there had been a Fifth Amendment "taking" of Indian lands are instances in which no payment, or only a derisory payment, had been made. *E.g.*, *United States* v. *Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119 (1938).[10] See also *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351 (1926).[11] And the pattern in the Court of Claims has been the same. To be sure,

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[9] The linchpin of the holding below is the court's conclusion that "[t]here is no reason to believe" and "no indication that Congress believed" its commitment to provide rations was equivalent to full value for the Black Hills (App. A, *infra*, 22a, 26a-27a).

[10] The majority here (App. A, *infra*, 32a n.7) invokes the *Klamath* case as an instance of a Fifth Amendment "taking" where some compensation was paid. The dissenting opinion argues (*id.* at 55a-57a) that the payment was an afterthought. At all events, the sum was less than 4% of the true value of the lands. See *id.* at 32a n.7.

[11] In *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 390 F.2d 686 (Ct. Cl. 1968), the court cited three precedents for the proposition that "the Government has frequently been held liable for just compensation under the Fifth Amendment, despite payment on its part to the Indians for the land taken." 390 F.2d at 695. The first is the *Klamath* case, already noted. The other cases are in no sense precedents, bothing involving takings without *any* pay-

the ruling so much relied on here, *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 390 F.2d 686 (Ct. Cl. 1968), did treat as a "taking" an appropriation of school sections for which substantial—albeit grossly inadequate—payment had been made. But that was on the ground that the measure of compensation was arbitrary on its face and could not therefore be assumed a good effort to pay full value. 390 F.2d at 694-695. Even that conclusion was later criticized. See 204 Ct. Cl. 831, 834-835 (1974). At all events, the case bears no resemblance to this one.

We question also whether the approach followed here is consistent with the intent of Congress in the framing of the Indian Claims Commission Act, under which the case arises. Insofar as it applies to "recognized" title, the statute permits Indian tribes to recover both for constitutional "taking[s]" and in respect of transactions vitiated by fraud, duress, mistake or "unconscionable consideration." 25 U.S.C. 70a.[12] But it was presumably contemplated that most

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ment, but inadequate congressional appropriations 26 and 32 years later. See *Uintah & White River Bands of Ute Indians* v. *United States*, 152 F. Supp. 953 (Ct. Cl. 1957); *Miami Tribe of Oklahoma* v. *United States*, 281 F.2d 202 (Ct. Cl. 1960).

[12] We put to one side cases under the "fair and honorable dealings" clause of the Act which, by definition, do not involve claims under the Fifth Amendment. For the most part, these are instances in which the United States appropriated aboriginal Indian lands, the tribal "title" to which had never been recognized, and the appropriation of which, absent special legislation, gives rise to no claim for compensation,

claims based on "recognized" title would fall in the latter class, involving inadequate consideration paid for Indian lands, whether ceded by the Tribe or appropriated unilaterally. The present holding, if generally followed, would defeat that expectation. For, if divesting a Tribe of a portion of its lands in return for an undertaking that in fact provides more than a fair equivalent be deemed a "taking," carrying interest, so must, it would seem, instances in which a Tribe yielded up lands wanted by the government for less than full value.

2. The monetary consequence of the decision below is substantial. In this instance, it multiplies the basic award six-fold, to reach a total of some $105 million, the largest judgment, we are informed, ever entered by the Court of Claims. Nor does this case stand alone. At least a dozen cases still pending in the Court of Claims may be governed by the rule announced here, with like effect. There is, moreover, a consideration of evenhanded treatment. To date, all successful claims based on inadequate consideration—as opposed to no payment at all—have been awarded without interest, with only the relatively insignificant exception of the school lands in the *Fort Berthold* case, *supra*. What is more, in many cases, offsets have substantially reduced the recovery. It may not be seen as equal justice if the present claimants, who received benefits far exceeding the value of the lands involved but were exceptionally excused from offsets, are allowed to

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much less interest on the award. See *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955); *United States* v. *Tillamooks*, 341 U.S. 48 (1951).

recover by way of interest many times the value of what they lost.

It may be that the court below was influenced to make this unprecedented ruling because Congress had taken the unusual step of re-opening a case otherwise barred by *res judicata* and had indicated its acquiesence in an award carrying interest. See App. A, *infra*, 38a-39a. But the Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153 (App. A, *infra*, 4a-5a), did no more than waive the jurisdictional bar. The controlling legal principles were not changed. No doubt, Congress is free to make as generous a payment for the Black Hills as it chooses. But neither the Court of Claims nor this Court properly can be asked to bend the rules when the Legislative Branch throws out a hint as to the result it hopes for, while, at the same time, directing the Judicial Branch to determine a constitutional question on the merits.

In our submission, the Court of Claims should have adhered to its correct decision of 1942 insofar as it then concluded that there had been no "taking * * * in violation of the fifth amendment." Whatever the explanation for the different course followed here, the present decision creates a precedent that may well embarrass future litigation, at very substantial cost to the national treasury. It ought not stand unreviewed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1979

APPENDIX A

IN THE
UNITED STATES COURT OF CLAIMS

No. 148-78

(Decided June 13, 1979)

SIOUX NATION OF INDIANS, ET AL.

v.

THE UNITED STATES

Arthur Lazarus, Jr., attorney of record, for plaintiff. *Marvin J. Sonosky, Sonosky, Chambers & Sachse*, and *William Howard Payne*, of counsel.

Craig A. Decker, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, DAVIS, NICHOLS, KUNZIG, BENNETT, and SMITH, *Judges, en banc.*

OPINION

FRIEDMAN, *Chief Judge*, delivered the opinion of the court:

The issue in this case, here on appeal from the Indian Claims Commission under a special jurisdictional statute described below, is whether the Commission correctly held that an 1877 statute under which the United States acquired certain lands from the Sioux Indians constituted a taking of those lands for which the United States was required to pay just compensation under the fifth amendment. The Commission found the fair market value of the land and other interests in it that the government thus acquired was $17,553,484.[1] The government has not challenged that determination or contested its obligation to pay that amount.

The sole question before us is whether that acquisition constituted a taking in violation of the fifth amendment. The significance of that issue is that if it were such a taking, the government would be liable not only for the value of the property taken but also for interest from the date of taking. *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497 (1937); *United States* v. *Klamath and Moadoc Tribes of Indians*, 304 U.S. 119, 123 (1938). Because the acquisition in this case occurred a century ago, the amount of such interest would be many times the value of the property taken. The total interest the plaintiffs would recover if a taking occurred has been estimated at between $90 million and $115 million.

[1] This amount consisted of $17,100,000 for the land itself, $3,484 for rights-of-way across other Sioux land, and $450,000 for gold that miners took from the land before the 1877 statute.

For the reasons given below, we conclude that the 1877 Act was a taking of the Black Hills portion of the Sioux Reservation and of rights-of-way across other Sioux land, but that the United States did not take the gold the miners removed from the Black Hills prior to the 1877 statute.

I.

This is the third time this case has been before the court on the question whether the United States' acquisition of the particular property in 1877 constituted a taking. Under a special jurisdictional Act, Pub. L. No. 237, 41 Stat. 738 (1920), the Sioux filed in this court a petition seeking just compensation for the alleged taking in 1877 of their lands and rights therein. In 1942 the court held that under that Act the Sioux were "not entitled to recover from the United States as for a 'taking' or 'for the misappropriations of any lands of said tribe.'" *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 666 (1942), *cert. denied*, 318 U.S. 789 (1943).

Following the enactment of the Indian Claims Commission Act in 1946 (25 U.S.C. § 70 *et seq.*), the Sioux submitted the same claim to the Commission. Initially the Indians contended only that the government's acquisition of their property was made for an unconscionable consideration and did not constitute fair and honorable dealings—grounds upon which the Commission could award damages under 25 U.S.C. § 70a(3) and (5). The Sioux, with our authorization, amended their petition to reassert the

fifth amendment taking. *See Sioux Tribe of Indians* v. *United States*, 182 Ct. Cl. 912 (1968) (summary of proceedings).

After extensive proceedings, the Indian Claims Commission, in the decision now under review, held in 1974 that the government's acquisition of the Sioux lands and interest therein constituted a taking for which the Sioux were entitled to just compensation, including simple interest at 5 percent. *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 362-63 (1974). On appeal, this court affirmed the award of $17,553,484 under the dishonorable dealings provision of the Indian Claims Commission Act, but reversed the Commission's finding of a taking. The court held that its 1942 decision was *res judicata* on the taking question. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298 (1975), *cert. denied*, 423 U.S. 1016.

Congress then enacted Pub. L. No. 95-243, 92 Stat. 153 (1978), which directed that this court, upon filing of a timely application, should

> review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony,

> that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.

The Sioux Nation filed an appropriate application for review pursuant to that statute. Neither party has submitted any additional evidence, so we decide the case on the record in our 1942 case and the record before the Commission in this proceeding.

II.

The factual background for this issue begins with the Treaty of April 29, 1868 between the United States and the Sioux Indians (15 Stat. 635). In that treaty the United States, among other things, (1) established "for the absolute and undisturbed use and occupation of the Indians" certain land in South Dakota, including more than 7 million acres in the Black Hills area (article II); (2) agreed that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [that] territory" (*id.*); (3) undertook to supply for 4 years certain food to all Indians who settled permanently on the reservation and complied with the treaty (article X); and (4) gave the Indians hunting rights in designated areas outside the reservation (articles XI and XV). The treaty further provided that no cession of any reservation lands of the Sioux "shall be of any validity or force" unless executed and signed by at least three-fourths of the adult male Indians occupying or interested in those lands (article XII).

In accordance with the treaty obligation, the United States appropriated more than $5 million to supply food to the Indians for the 4 years following the treaty. Although the government's treaty obligation was discharged by the appropriation for fiscal year 1874, the government continued to make food appropriations for the fiscal years 1875 and 1876, which totaled $2,350,000.

Both before and when the treaty was executed, the Indians knew that the Black Hills contained gold, but the government had no reason to think that the amount located there was sufficient to be valuable. In the summer of 1874, however, an expedition commanded by Lt. Col. Custer explored the Black Hills portion of the reservation, and discovered gold there in paying quantity. News of this discovery was made public in late August of that year. A large number of prospectors, miners, and settlers then entered the area without the consent of the Indians, and public pressure to open the Black Hills developed and increased.

United States military forces in the area attempted to exclude and remove these unauthorized persons from the area, but their endeavors were largely unsuccessful. In November 1875, President Grant secretly ordered the Army to stop attempting to prevent the miners from entering the area. Although President Grant did not rescind prior orders forbidding the miners from occupying the Black Hills area, those earlier orders ceased to be effective. The government apparently believed that the Sioux's needs for the

rations the government had been supplying them would prevent the Indians from making trouble.

By 1875 the government apparently had concluded that the only permanent solution to the hostilities that had developed between the Indians and the settlers in the Black Hills and among the settlers themselves was for the government to acquire the Black Hills portion of the reservation and for the Indians to give up their hunting rights outside the reservation. Preliminary attempts to induce the Indians to take those steps through negotiations with the Sioux that were held both in Washington and in the reservation area were unsuccessful. In December 1875, the government ordered all Sioux to return to the reservation by January 31, 1876, or be treated as hostile. The Indians who were outside the reservation were hunting with the permission of their agents and could not return by the deadline. The Army then commenced military operations against them. The climax of the campaign against the Sioux was the famous defeat of General Cluster at the Little Big Horn on June 25, 1876.

Congress responded by attaching a rider to the Indian Appropriations Act of 1876 which cut off all rations for the Sioux until they terminated hostilities and ceded the Black Hills to the United States. The rider also provided that no further appropriations for the Sioux would be made until the Indians had entered into an agreement with the President "which is calculated and designed to enable said Indians to

become self-supporting." Act of Aug. 15, 1876, 19 Stat. 176, 192.

In August 1876, at the request of Congress, the President appointed another commission (1876 Commission) to negotiate with the Sioux for the cession of the Black Hills and the termination of the Indians' off-reservation hunting rights.

The 1876 Commission negotiated an agreement with the chiefs and head men of the Sioux tribes. The agreement stated it was made "pursuant to" the 1876 Appropriations Act. In the agreement, the Sioux ceded to the United States the Black Hills portion of their reservation and rights-of-way over other reservation lands for access to the Black Hills. In return, the United States agreed (1) "to provide all necessary aid to assist the said Indians in the work of civilization"; (2) to furnish the Indians "schools and instructions in mechanical and agricultural arts, as provided for by the treaty of 1868"; and (3) to provide them with specified rations "until the Indians are able to support themselves." Where government schools were provided, rations would not be issued for children between the ages of 6 and 14 unless they regularly attended school. Rations would be issued to Indians located upon land suitable for cultivation only to those persons (other than the aged, sick, and infirm) "who labor[ed]." *See* Act of Feb. 28, 1877, 19 Stat. 254, 255-56.

Less than 10 percent of the male Sioux population aged 21 years or older approved the agreement. The agreement, therefore, did not satisfy the requirement

of the 1868 treaty that no cession of territory could be made without the written approval of three-fourths of the adult males. Congress then "resolved the impasse by enacting into law the unratified agreement" by the Act of February 28, 1877, 19 Stat. 254. *United States* v. *Sioux Nation*, 207 Ct. Cl. at 238, 518 F.2d at 1300. As a result of that Act, which "ratified and confirmed" the agreement, the United States acquired all of the Sioux lands in the Black Hills, and terminated the Indians' off-reservation hunting rights.

Subsequent to the Act of 1877, the United States expended substantial amounts in furnishing rations to the Sioux. The parties disagree over the precise amount of those expenditures. According to the defendant the United States spent approximately $43 million on rations for the Sioux from 1877 to 1942. *See Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. at 656, 662.

III.

A. Ordinarily, when the United States appropriates property interests of others, that constitutes a taking under the fifth amendment, for which the United States is obligated to pay just compensation. But,

> [w]hen Congress deals with the Indian property it can act in one of two capacities. First, Congress can exercise a guardianship over Indian property, derived from its plenary power recognized in the Constitution to control tribal Indian affairs. Or it may exercise its fundamental

power of eminent domain and take Indian property, for which it must pay just compensation.

Klamath and Modoc Tribes v. *United States*, 193 Ct. Cl. 670, 684-85, 436 F.2d 1008, 1015 (1971) (footnote omitted).

In *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968), the court announced the following "guideline" for "identify[ing] in which capacity Congress is acting":

> Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee.

182 Ct. Cl. at 553, 390, F.2d at 691.

The court reiterated and applied that standard in subsequent cases presenting the question whether Congress' appropriation of Indian property constituted a taking. *Klamath and Modoc Tribes* v. *United States*, 193 Ct. Cl. at 685, 436 F.2d at 1015; *Confederated Salish & Kootenai Tribes* v. *United States*, 193 Ct. Cl. 801, 805, 437 F.2d 458, 459 (1971).

Apparently there has been some misconception that the "good faith effort" guideline in *Fort Berthold* requires or permits an inquiry into the subjective understanding and intent of Congress. See order of March 29, 1974, in Appeal No. 17-72, *The*

Three Affiliated Tribes of the Fort Berthold Reservation, et al., Nichols, J., concurring, 204 Ct. Cl. 831, 833. The *Fort Berthold* guideline contemplated only an objective inquiry into the nature and purpose of the congressional action, not an attempt to determine the subjective motive of the legislature in taking that action. In determining whether Congress has made a good faith effort to give the Indians the full value of their lands when the government acquired it, we therefore look to the objective facts as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition. As hereinafter shown, this is the kind of evidence upon which we have relied in reaching our conclusion in this case.

The "good faith effort" and "transmutation of property" concepts referred to in *Fort Berthold* are opposite sides of the same coin. They reflect the traditional rule that a trustee may change the form of trust assets, as long as he fairly (or in good faith) attempts to provide his ward with property of equivalent value. If he does that, he cannot be faulted if hindsight should demonstrate a lack of precise equivalence. On the other hand, if a trustee (or the government in its dealings with the Indians) does not attempt to give the ward the fair equivalent of what he acquires from him, the trustee to that extent has taken rather than transmuted the property of the ward. In other words, an essential element of the

inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired. That inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians.

The question in this case, therefore, is whether, in appropriating the Black Hills portion of the Sioux Reservation in the Act of 1877, Congress made "a good faith effort to give the Indians the full value of the land." 182 Ct. Cl. at 553, 390 F.2d at 691.[2]

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[2] In *Klamath and Modoc Tribes* v. *United States*, the court noted that the government had not contested that certain Indian lands had been "taken, in the strict eminent-domain sense" when they were transferred to the government in 1961 pursuant to an earlier statute terminating federal control over the Indians. 193 Ct. Cl. 670, 689, 436 F.2d 1008, 1017 (1971). In a footnote to that statement the court stated, "The concession by the Government that there was a taking is quite correct . . . . The 'good faith' principle of *Fort Berthold* does not apply to acquisition of Indian land by the Federal Government itself." *Id.* n. 25. The plaintiff argues that under that qualification there is no need here to consider "good faith," since the fact that the United States acquired the Black Hills for its own use without more established a taking.

As noted in the text, the rationale of the "good faith" principle is that there is no taking of Indian property if Congress "has made a good faith effort to realize its full value for the Indians, . . . [where] it has in effect performed the trustee's traditional function of transmuting property into money." *Id.* at 685, 436 F.2d at 1015. Thus, "Congress makes a good faith effort to obtain full value for Indian land, to be sold to others, when it establishes and uses an adequate, competent and impartial appraisal system to value the property." *Id.* at 687, 436 F.2d at 1016. Conversely, there is no occasion to consider "good faith" where the United States appropriates Indian lands for itself without attempting to give the Indians the fair equivalent of what it acquires. Where, however, the government contends that it has not taken Indian land in the eminent-domain sense because, although it acquired the land for itself, it nevertheless gave the Indians the fair value of the property, the taking *vel non* depends upon whether the government meets the "good faith" standard of *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968). Moreover, in this case the lands were taken for ultimate disposition to settlers rather than, as in *Klamath and Modoc*, for the government's own continued use.

The defendant asserts that in this case a good faith effort is shown (1) in the government's undertaking to provide rations for the Sioux "until the Indians are able to support themselves" and (2) in its subsequent expenditure of at least $43 million on such food. According to the government, the assumption of this substantial financial obligation and its discharge at great expense gave the Sioux the full value of the land the government took from them, so that the appropriation did not constitute a fifth amendment taking.[3]

The answer to the question requires a more detailed examination of the circumstances surrounding the

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[3] The 1877 Act effected the appropriation of the Black Hills by redefining the boundaries of the Sioux Reservation. That redefinition gave the Indians approximately 900,000 acres of land they had not theretofore had. The defendant does not contend, however, that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills.

action of Congress in appropriating the Sioux land in 1877.[4]

[4] In 1974 Congress amended section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a, to provide that "expenditures for food, rations, or provisions shall not be deemed payments on the claim." Pub.L.No. 93-494, 88 Stat. 1499, 1500 (1974). The plaintiff argues that the 1974 amendment requires this court to decide the taking claim without regard to either the provision for food rations in the 1877 treaty or the value of the rations actually provided. According to the plaintiff, the 1974 amendment established the general rule that provisions for Indian subsistence cannot be considered compensation.

The legislative history of the 1974 amendment indicates that the amendment was intended to apply to the calculation of offsets following an award, and not to the initial determination whether the plaintiff is entitled to recover an award in a fifth amendment taking claim. The Senate Report on the 1974 amendment states that the amendment was "designed to correct an inequity in connection with the claim of the Sioux tribes of North and South Dakota." S. REP. NO. 93-863, 93d Cong., 2d Sess. 2, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS, 6111, 6112. The report quoted approvingly a statement provided by the Sioux Tribes that "[a]lthough couched in general terms, this amendment is directed to . . . expediting . . . disposition of the famous Black Hills case . . . ." *Id.*

During the House Subcommittee on Indian Affairs' hearing on the amendment, Representative Meeds, chairman of the subcommittee, stated:

> In February of this year, the Indians Claims Commission determined that the United States had, in violation of the fifth amendment to the Constitution, unilaterally taken over 7 million acres of Sioux land which they determined had an 1877 value of $17,100,000. In addition to the value of certain gold taken from the hills area between 1868 and 1877, the total value was set at $17,550,000 upon which the United States was required to pay 5 percent simple interest from the time of taking.

B. In June 1875, more than 9 months after the Custer expedition had discovered gold in paying quantities in the Black Hills, a delegation of Sioux Indians met with the President in Washington for a preliminary discussion of the cession by the Indians

[4] [Continued]

> Under the provisions of the Claims Commission Act, the Commission determined that the United States could offset food, rations, and other provisions supplied to the Sioux under the 1877 agreement. If so applied, they would almost totally, or totally wipe out any award the Sioux would try to recover.
>
> It is from this result that the Sioux appeal, and the subject, this bill would remedy.

Amending the Indian Claims Commission Act: Hearing on H.R. 16170 Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 4 (1974) (remarks of Representative Meeds).

Underlying the House Subcommittee hearing was a deep concern for the fate of the Commission's $17 million award to the Sioux Indians. The subcommittee focused upon the question whether the value of the rations provided to the Sioux should be offset against the Commission's award with the resulting substantial diminution or possible elimination of the award. There is no indication that, in providing that expenditures for rations were not to be deemed "payments on the claim," Congress intended to bar consideration of a government commitment to provide subsistence in determining whether the government's application of the Sioux's Black Hills lands in 1877 constituted a fifth amendment taking.

The location of the amendment in the paragraph of section 70a dealing with "determining the *quantum* of relief" (emphasis supplied) further supports our conclusion. The determination whether there has been a taking normally involves the question of liability rather than the quantum of damages.

of the Black Hills and their off-reservation hunting rights. The President pointed out to the Sioux that "there will be trouble in keeping white people from going there for gold, if it should be discovered . . . it is possible that strong efforts might not be made to keep them out." The President also told the Sioux that if the United States should purchase the Black Hills, "I would try to see you get a full equivalent in value" and that he was "very anxious that the Government of the United States should pay them in a way that will be of most benefit to them, a full equivalent for all that they have given up . . . ." *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. at 630-32.

In September 1875, the Allison Commission, which the Secretary of the Interior had appointed upon instructions from President Grant to negotiate with the Sioux for the cession of the Black Hills and the surrender of hunting rights, met with the Indians on the reservation in a Grand Council. The commission urged the Indians to sell the Black Hills

> because 1—they were unable to support themselves and ought to bow to the wishes of the Government which fed them, 2—the Army was unable to keep settlers out of the hills and armed conflict between whites and Indians was inevitable, and 3—gold was useless to the Sioux.

Sioux Nation v. *United States*, 33 Ind. Cl. Comm. at 252, finding 5. The Sioux offered to sell the Black Hills for $70 million. The commission offered $6 million, or alternatively, $400,000 a year for the right

to mine, grow livestock, and cultivate the soil in the Black Hills, and $500,000 (paid over 10 years) for the surrender of the Sioux's off-reservation hunting rights. No agreement was reached.

In its report on the unratified 1876 agreement that Congress adopted in the 1877 statute, the 1876 Commission stated that the Allison Commission had failed to obtain an agreement "because they had no authority to offer them [the Indians] any sum which would be a just equivalent for their right in the Black Hills, or which gave to the Indians hopes for the future." S. EXEC. DOC. NO. 9, 44th Cong., 2d Sess. 12 (1876).

Following the failure of the 1875 negotiations, the government changed its prior policy of using the Army to exclude miners and settlers from the Black Hills (see p. 5 *supra*). In November 1875 the Army began to withdraw from the area.

In his annual report to Congress for 1875, the Secretary of the Interior, after noting the failure of the Allison Commission to negotiate an agreement, pointed out that for 2 years the United States had appropriated more than a million dollars annually for the subsistence of the Sioux. He stated that this was "a gratuity that the Government is under no obligations to give them, and for which it receives no compensating advantage." *Sioux Tribe Indians* v. *United States*, 97 Ct. Cl. at 647. He suggested that Congress consider "whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment

of t e gold fields in the Black Hills and the right-of-way thereto." *Id.*

As noted, the acquisition of the Black Hills was made by the Act of 1877. In that Act Congress adopted the unratified agreement which the 1976 Commission had negotiated with the Sioux chiefs and head men. Since it was the rider to the Appropriations Act of 1876 that provided for the appointment of the 1876 Commission and defined its authority in negotiating with the Sioux, the legislative history of that Act is highly significant in ascertaining the intention and theory of Congress in acquiring that land.

The antecedent of the 1876 Appropriations Act was S. 590, 44th Cong., 1st Sess., which was a bill "providing for an agreement with the Sioux Nation in regard to a portion of their reservation and for other purposes." 4 CONG. REC. 1662 (1876). As reported by the Committee on Indian Affairs on March 15, 1876, the bill provided for a commission to negotiate with the Sioux for cession of the Black Hills, in return for which the United States would provide the Indians with subsistence for not more than 10 years. The bill further provided that subsistence would be terminated on July 1, 1877 (more than a year later) unless by then the Sioux had agreed to cede the Black Hills. After extensive debate (*id.* at 1796-1801, 1829-30, 2177, 3530-39), the bill was amended to eliminate the provision for termination of subsistence; it provided for a commission to negotiate with the Sioux "for the cession to the United States" of parts of the

reservation and adjacent territory "or otherwise for the preservation of peace." *Id.* at 3539. The Senate passed it in that form.

In the House, S. 590 was reported with an amendment which permitted the proposed commission to negotiate for the acquisition of the Black Hills (*id.* at 3817), but the bill was recommitted and died in committee (*id.* at 4470, 4520). The House then passed H.R. 3478, the Appropriations Bill for the Indian Department, which stated that no portion of the appropriation of $1 million for feeding the Sioux would be available unless the Indians first agreed to abandon all claims to lands outside the reservation. *Id.* at 3498, 3503-08, 3639.

The Senate modified H.R. 3478 to provide that one-half of the appropriation for Sioux subsistence would be suspended until the Indians agreed to cede the Black Hills and to relinquish their off-reservation hunting rights. *Id.* at 3902. The House refused to accede to this change (*id.* at 4043), and successive conference committees were appointed. *Id.* at 4043, 4057, 4324, 4563, 5463, 5539.

On June 25, 1876, General Custer was defeated at Little Big Horn. Less than 2 months later, on August 15, 1876, Congress enacted the 1876 Appropriations Act, with its rider (1) cutting off rations for the Sioux unless they terminated hostilities and ceded the Black Hills, and (2) providing for a commission to carry those provisions into effect.

Pursuant to this provision, the President appointed the 1876 Commission that negotiated with the Sioux

the unratified agreement ceding the Black Hills. In transmitting the report of the commission to the Secretary of the Interior, the Commissioner of Indian Affairs described the commission as one "to obtain certain concessions from the Sioux, in accordance with provision contained in the Indian appropriation act for the current fiscal year." S. EXEC. DOC. NO. 9 at 2. In transmitting that report to the Congress, President Grant used almost identical language in describing the commission. *Id.* at 1.

The instructions to the commission, referring to the rider to the Appropriations Act, stated that "the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government and upon full evidence of their disposition to undertake in earnest measures for their own advancement and support." *Id.* at 4. In its meeting with the Sioux the 1876 Commission "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." S. EXEC. DOC. NO. 9 at 6. The Indians were left with no doubt that if they refused to cede the Black Hills they would receive no further rations from the government. Since the Army had taken from the Sioux their weapons and horses, the alternative to capitulation to the government's demands was starvation, because the Indians no longer had the weapons for hunting, and as hunters they did not know how to farm and raise their own food.

The "consideration" stated in the 1876 agreement for the Sioux's "cession of territory and rights" and "compliance with each and every obligation assumed by the said Indians" was that the United States agreed: (1) to provide the Sioux with "all necessary aid to assist the said Indians in the work of civilization," (2) to furnish to them "schools and instructions in mechanical and agricultural arts, as provided for by the treaty of 1868," and (3) to supply them with specified rations "until the Indians are able to support themselves." *See* 19 Stat. 254, 256. The first item of consideration—the provision of "all necessary aid" to assist the Sioux in becoming civilized—entailed no specific benefits or obligations and was so vague that it cannot be considered as constituting a meaningful or significant element of payment by the United States. In the second item the government merely undertook to perform its obligations under the 1868 treaty; this provision gave the Sioux nothing to which they were not already entitled.

The only item of "consideration" that possibly could be viewed as showing an attempt by Congress to give the Sioux the "full value" of the land the government took from them was the requirement to furnish them with rations until they became self-sufficient. Indeed, this is the only "payment" upon which the defendant significantly relies to show that there was no fifth amendment taking.

After the commission returned to Washington with the executed but unapproved agreement, it submitted

in December 1876 a lengthy report describing its negotiations with the Sioux. SEN. EXEC. DOC. NO. 9 at 5-90. President Grant transmitted the report to Congress. *Id.* at 1. The report stated that the commission had "accepted the trust confided to them under the grave responsibility that if they failed in their mission the twenty thousand friendly Indians at the agencies must either starve or join the hostile Indians." *Id.* at 6. The report described at length the many separate discussions the commission held with the various Indian groups (*id.* at 29-86) and sharply criticized the government's policy toward, and treatment of, the Sioux. *Id.* at 9-18. The report stated that "The least we can do is to repay these friendly Indians honestly for the full value of the property which was taken" (*id.* at 16) and that the commission was "confident that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs which furnish the darkest page of our history." *Id.* at 17-18. The report also noted that, at the first meeting with the Indians, the commission told them that it had full authority from Congress and the President "to devise a plan to save their people from death and lead them to civilization," and it described the first element of the plan as "to provide ample rations for their subsistence until able to support themselves . . . ." *Id.* at 6.

Nowhere in the report, however, does the commission indicate that it believed the provisions for rations constituted a fair equivalent for the value of

the Black Hills lands the Indians were surrendering.

On June 26, 1877, the Senate Committee on Indian Affairs reported a bill to "ratify and confirm" the agreement. 5 CONG. REC. 983 (1877). The Senate passed the bill the next day. The debate in that chamber dealt almost entirely with the possible movement of the Sioux from their reservation to Indian territory (*id.* at 1055-58)—a provision which was included in the agreement although agreed to by only two of the bands and which the Senate committee deleted. *Id.* at 1055. The sole reference to the Black Hills was Senator Allison's statement that

> [i]t is an imperative necessity that so much of this agreement as provides for the relinquishment of that vast area of territory which lies west of this boundary should be at once placed in the possession and under the control of the Government of the United States, and that can only be done by giving the force and effect of our sanction to this bill.

Id. at 1057.

The House passed the bill almost 3 weeks later on February 15, 1877. *Id.* at 1617. There, as in the Senate, the debate dealt almost entirely with the possible removal of the Sioux to Indian territory. *Id.* at 1615-17. Representative Boone described the bill as one of "great importance" that should be passed. He explained:

> The Black Hills country is to the people of the United States a valuable country. This agreement concedes the Black Hills territory to the

> Government of the United States, in consideration of which we make provision for feeding these Indians upon the Missouri River at points contiguous to the means of transportation, so that there will be a saving to the Government in feeding the Indians, in addition to the transfer of this valuable country to the United States.
>
> Besides this, the Indians by this bill are to be placed on a part of the reservation which they now hold which is susceptible of cultivation; and if we are ever to succeed in teaching them the arts of agriculture and civilization they will be in a position where we can carry forward those great enterprises which have succeeded so well in the Indian Territory with much greater facility than can possibly be done in the present scattered and inaccessible condition of these Indians.

Id. at 1615.

Similarly, Representative Crounse stated: "It is of the greatest importance that this bill pass and that the Black Hills country be opened up at once." *Id.* at 1616.

The lack of any discussion of whether the "consideration" provided by the United States was adequate consideration for the lands surrendered may have reflected the belief which Senator Allison stated, that the agreement "has already been agreed to by all these bands." *Id.* at 1056. Senator Allison did not note that the cession of the Black Hills was not approved by three-quarters of the adult male Indians, as the 1868 treaty required.

C. The foregoing history of congressional consideration of obtaining the Black Hills and of the negotiations with the Sioux about the cession of those lands demonstrates that in the Act of 1877 Congress did not make "a good faith effort to give the Indians the full value of the land." *Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. at 553, 390 F.2d at 691. The terms upon which Congress acquired the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price. In the "negotiations" the United States gave the Indians the Hobson's choice of ceding the Black Hills or starving. Not surprisingly, the Sioux chiefs and head men chose the former rather than the latter.

The earlier attempt by the Allison Commission to negotiate an agreement for the sale of Black Hills foundered because of the gross disparity between the $70 million the Indians asked and the $6 million the government offered. Since the treaty of 1868 had given the Sioux "the absolute and undisturbed use and occupancy" of the Black Hills, the Indians were under no legal compulsion to sell. They were induced to yield these valuable lands to the government because of the threatened cutoff of their rations, which were essential to their existence.

When the agreement for cession of the Black Hills failed to gain the written approval of three-quarters of the adult male Sioux as the 1868 treaty required for a cession to have "any validity or force," Con-

gress merely "ratified and confirmed" the unapproved agreement and thereby acquired the Black Hills.[5] There is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them.

In return for obtaining the Black Hills, the government did not even unqualifiedly undertake to provide all the Sioux with food. The right of the Indians to receive rations was qualified by the provisions that rations would be furnished for children between the ages of 6 and 14 only if they attended government schools, and for non-infirm Indians located upon land suitable for cultivation only if they performed "labor." Indians who did not meet these conditions would receive no food, irrespective of any rights they may have had with respect to the property the United States acquired. These conditions further show that the government's undertaking to furnish rations to the Indians until they could support themselves did not reflect a congressional decision that the value of the rations was the equivalent of the land the Indians were giving up, but instead

[5] The only significant change the 1877 Act made in the agreement was the elimination of the provision, which the Indians considered particularly objectionable, that the Sioux would move from their reservation to other lands the United States would provide in Indian territory. That change did not alter or affect the consideration the United States gave for the Black Hills.

was an attempt to coerce the Sioux into capitulating to congressional demands.

In the 2 years following termination of its obligation under the treaty of 1868 to furnish rations for 4 years, the government gratitously had appropriated $2,350,000 to feed the Sioux. In the 1876 Appropriations Act Congress appropriated $1 million for "subsistence" for the Sioux and "for purpose of their civilization." The bill (S. 590 *supra*, p. 12) from which the cutoff rider of the 1876 Appropriations Act was derived, provided that if the Sioux ceded the Black Hills, the United States would furnish subsistence to the tribe "from year to year *for a period not exceeding ten years* . . . in such manner as Congress may by law provide" (emphasis provided).

Congress hoped and anticipated that in a relatively short time the Sioux would learn the ways of civilized society and become self-sufficient. In the treaty of 1868 the United States had undertaken to do various things which it hoped would accomplish those objectives, such as building schools, giving instruction in farming, providing blacksmiths, etc. 15 Stat. 635, 637-38. There is no reason to believe that Congress anticipated (1) that it would be required to continue to supply rations for more than a half-century, or (2) that its fulfillment of the obligation to feed the Sioux would entail the large expenditures it ultimately made.

The fact that over the years Congress may have spent substantially more in furnishing rations than

the fair market value of the Black Hills in 1877 does not establish that when Congress undertook to supply the rations it "was attempting to give the Indians the full value of the land." *Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. at 555, 390 F.2d at 692. The critical inquiry is what Congress did—and how it viewed the obligation it was assuming—at the time it acquired the land, and not how much it ultimately cost the United States to fulfill the obligation. If the legislative action when taken did not reflect "the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit" (*id.* at 557, 390 F.2d at 693), the subsequent payment to those wards of amounts that in hindsight appear to equal or even exceed the fair value of the property does not make the initial acquisition any the less a fifth amendment taking. As this court stated in the *Fort Berthold* opinion, where the government argued that its acquisition of certain Indian lands in 1917 by Presidential proclamation was not a taking because the government paid an adequate amount for the lands in 1920, "[a] unilateral appropriation of money several years later does not affect the character of the original taking." *Id.* at 564, 390 F.2d at 698.

D. The defendant argues, however, that *Lone Wolf* v. *Hitchcock*, 197 U.S. 553 (1903), controls this case and establishes that the acquisition of the Black Hills by the 1877 Act did not constitute a taking.

The underlying facts in that case were somewhat similar to those here, but the legal issue was quite different. An 1867 treaty with certain Indian tribes established a reservation for them and provided that no treaty for the cession of reservation lands would be "of any validity or force" unless executed and signed by three-quarters of the adult males. In 1892 the Indians agreed to cede the reservation to the United States, in return for allotments out of those lands and the payment to and setting aside for the Indians of $2 million. Although it appeared that the requisite three-quarters of the Indians had signed the agreement, it subsequently developed that the requisite number had not signed. In 1900 Congress enacted a statute which in effect adopted the 1891 agreement. The Indians then filed a bill in equity to enjoin the government from carrying out the statute which, they asserted, violated the 1892 treaty requirement of consent by three-quarters of the adult male Indians.

The Supreme Court upheld the lower courts' dismissal of the suit. It ruled that the plenary power of Congress "to administer the property of the Indians" authorized it "to abrogate the provisions of an Indian treaty" (*id.* at 565-66); that the power "has always been deemed a political one, not subject to be controlled by the judicial department of the government" (*id.* at 565); that the 1900 statute "purported to give an adequate consideration for the surplus lands not allotted among the Indians or re-

served for their benefit" (*id.* at 568); that the Court "must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the government exercised its best judgment in the premises" (*id.*); and that "[i]n any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts. The legislation in question was constitutional, and the demurrer to the bill was therefore rightly sustained" (*id.*).

In the *Lone Wolf* case, the Supreme Court was not required to, and did not, decide the legal issue whether, as a result of the 1900 statute, the Indians were entitled to recover just compensation for a fifth amendment taking. The claim made by the Indians was that, if the statute were enforced, their rights under the Treaty would be violated and Congress "would deprive said Indians of their lands without due process of law." 187 U.S. at 561. By proceeding in equity, the Indians necessarily raised the threshold issue whether the governmental action in question could or should be enjoined. The Court concluded that Congress had the power to proceed with its plan for appropriation of Indian lands, and that it was not within the province of the judiciary to stay

the hand of Congress. The Indians recognized that they had no remedy at law, and the Court ruled that they were not entitled to equitable relief. Under the circumstances, the Court inescapably concluded that, if Congress caused some injury by the exercise of its power, "relief must be sought by an appeal to that body" and not through the judicial process. 187 U.S. at 568.[6]

There is broad language in the *Lone Wolf* opinion that could be read as suggesting that the courts will not inquire into the propriety of congressional action concerning Indian property or consider the adequacy of the consideration Congress gave for the lands it appropriated from the Indians. The Supreme Court, however, frequently has cautioned against uncritically applying language used in a particular context in

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[6] In the *Lone Wolf* case, the bill of complaint before the lower court recited that the plaintiff and other tribal members were "wholly without remedy at law," and stated that they would suffer great property loss if the court were to deny injunctive relief. Supreme Court Record on Appeal No. 275 (October Term, 1902) at 15. In their appeal of the lower court's denial of equitable relief, the appellants argued before the Court that several acts remained to be done before the challenged statute would be fully implemented. Reply Brief of Appellants at 2. Thus, in asserting that "[t]he property of Appellants cannot be taken from them for public use without just compensation," the appellants were arguing that the Court should prevent actions which, appellants believed, would result in an unconstitutional taking *if* not promptly enjoined. Brief and Argument of Appellants at 37. As a result of its determination that equitable relief was not available, the Court did not have to reach the ultimate, legal question of entitlement to just compensation.

dealing with different situations. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 132-33 (1944) ("[w]ords of our opinions are to be read in the light of the facts of the case under discussion. . . . General expressions transposed to other facts are often misleading."); *White* v. *Aronson*, 302 U.S. 16, 21 (1937); *Puerto Rico* v. *Shell Co.*, 302 U.S. 253, 269 (1937); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821).

The statements in *Lone Wolf* upon which the defendant relies were all made in determining whether courts should enjoin the enforcement of a statute which, by appropriating Indian property, was inconsistent with an Indian treaty. The question in this case, however, is a quite different one: whether a statute by which Congress appropriated Indian lands constituted a fifth amendment taking for which the United States is required to pay just compensation.

Since *Lone Wolf*, in which no consent had been given to sue the United States for just compensation, the Supreme Court has recognized that if the United States takes Indian property for its own use or to give to others, it must pay just compensation. This has been done where no compensation was originally paid and where the initial compensation was grossly inadequate.[7] These are cases in which consent to sue

[7] In *United States* v. *Klamath and Moadoc Tribes of Indians*, 304 U.S. 119 (1938), the United States paid $108,750 in related parts of a single transaction (*see Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cl. 451, 457-58 (1937)) for Indian land which this court later found to have been worth $2,980,000. The Supreme Court held that there was a constitutional taking for which just compensation had to be paid, including interest. 304 U.S. at 122, 123-25.

for such compensation was authorized by special jurisdictional acts and include *United States* v. *Creek Nation*, 295 U.S. 103 (1935), and *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938). A significant element of the *Lone Wolf* decision apparently was the principle that the courts would not examine the consideration that Congress had given for Indian lands it had taken. However, we think the entitlement of plaintiffs to recover in this case should be determined in accordance with the principles laid down in post-*Lone Wolf* decisions, in which the consideration paid the Indians is taken into account in determining whether just compensation has been given. 304 U.S. at 125. *See also, United States* v. *Sioux Nation*, 207 Ct. Cl. at 250, 518 F.2d at 1307 (dissenting opinion of Davis, J.).

IV.

The Indian Claims Commission also held that the acquisition by the United States in the 1877 Act of rights-of-way across other Sioux lands constituted a taking for which the Indians are entitled to just compensation. It valued those rights-of-way at $3,484. The defendant concedes that the rights-of-way claims "Fall Into The Same Category As The Black Hills Transfer." Defendant's Answering Brief at 118. In view of our ruling that the government's acquisition of the Black Hills constituted a taking, we also affirm the Commission's ruling that the government's acqui-

sition of the rights-of-way was a taking for which just compensation must be paid.

V.

Prior to the 1877 Act, miners had entered the Black Hills area and removed from it gold which the Commission valued at $450,000. The Commission held that this removal of gold was a taking by the United States. It noted the provision in the 1868 treaty by which the United States agreed that unauthorized persons would not be permitted to enter the reservation. The Commission held that the act of taking was the order of President Grant that "the Army withdraw from the Black Hills and stop interfering with miners attempting to enter therein" (33 Ind. Cl. Comm. at 224), and that the date of taking was November 17, 1875, when the Army began to withdraw from the Black Hills. *Id.* at 227. The Commission's rationale was that the removal of the gold from the Sioux reservation was the "direct and natural consequence of President Grant's order" (*id.* at 227) and that "[t]o constitute a taking, it is only necessary that the claimant's loss of its property be the natural and probable consequence of an intentional governmental act" (*id.* at 225).

In its previous decision in this case, the court recognized that the Commission's award of $450,000 for the gold was sustainable under the "fair and honorable dealings" section of the Indian Claims Commission Act, 25 U.S.C. § 70a(5) (*United States* v. *Sioux*

Nation, 207 Ct. Cl. at 240-41, 518 F.2d at 1301), and the government has not challenged that award. *Cf. Temoak Band of Western Shoshone Indians* v. *United States*, slip op. Appeal No. 1-78, decided February 21, 1979; *United States* v. *Goshute Tribe*, 206 Ct. Cl. 401, 512 F.2d 1398 (1975). It is quite another matter, however, to conclude that the action of the miners in illegally removing gold from the Indians' land constituted a taking of that gold by the United States for which just compensation must be paid. We reverse the Commission's ruling on this issue.

The plaintiff contends that the Act of 1877 constituted congressional ratification of President Grant's order terminating the Army's efforts to keep the miners out—an order the effect of which was to permit the miners to remove gold from the Black Hills. Although the statute ratified the agreement the commission had entered into with the chiefs and head men of the Sioux for the cession of the Black Hills, Congress neither ratified nor approved the removal of the gold by the trespassing miners. To the contrary, during congressional consideration of the 1876 Appropriations Act ration cutoff rider, Senators repeatedly condemned the illegal acts of the miners and criticized the government for not having prevented them. 4 CONG. REC. 1796 (Senator Bogy), 1797 (Senator Hamilton), 1798 (Senator Allison, Senator Edmunds), 1799 (Senator Edmunds), 3531 (Senator Edmunds), 3534 (Senator Bogy), 3949

(Senator Morton). Nothing in either that legislation or the 1877 Act indicates or even suggests that Congress was approving the removal of the gold or the actions of the executive branch that facilitated the removal, or itself was attempting to gain the benefits thereof. Indeed, there is no indication that in 1876 or 1877 Congress was even aware either of President Grant's order or of the commencement of the withdrawal of the Army from the Black Hills in November 1875.

This case is unlike *Shoshone Tribe* v. *United States*, *supra*, upon which the plaintiff heavily relies. There the government in 1868 had established a reservation for the "absolute and undisturbed use and occupation of the Shoshone Indians" and provided that no person should ever be permitted to settle or reside in that territory. 299 U.S. at 485-86. Ten years later a band of Northern Arapahoes was brought to the reservation under military escort and settled there. Although the Shoshones were informed that the Arapahoes were there only temporarily, the Indian Commissioner responsible for the arrival had other views. The Arapahoes gradually took over an ever-increasing portion of the reservation so that ultimately they had the entire eastern section. In subsequent legislation Congress treated "the two tribes as lawful occupants and equals." *Id.* at 490.

The Supreme Court held that the United States had taken the Shoshone land in 1878. It stated

> that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States through the action and inaction of its executive and legislative departments for half a century of time, has ratified the wrong, adopting the *de facto* appropriation by relation as of the date of its beginning.

Id. at 495.

In the *Shoshone* case the government itself placed the Arapahoes on the Shoshones' land, encouraged and aided them to remain there and then recognized and treated them as the owners. The government thus gave the Shoshones' tribal lands to others, and that constituted a taking for which just compensation was required. *Id.* at 497-98; *United States* v. *Creek Nation*, 295 U.S. at 110. In the present case, by contrast, the government neither brought the miners onto the Black Hills land nor encouraged them to settle there. On the contrary, the government originally attempted to exclude them, and Congress repeatedly criticized the miners' trespassing onto the land.

The plaintiff's claim that the removal of the gold was a taking rests upon the government's failure to keep the miners out and the alleged congressional ratification of that action. As we have already noted, there is no showing of congressional ratification or approval. The extent and significance of the government's involvement in the miners' removal of the

gold is a matter of degree, and its involvement here was significantly less than in the *Shoshone* case. We cannot say that what the government did or failed to do with respect to the removal of gold constituted a taking for which the government was required to pay just compensation.

VI.

We understand that the award in this case is the largest the Indian Claims Commission ever made. Congress, however, was aware of the the size of the recovery that would result if the court held that the appropriation of the Black Hills by the 1877 Act constituted a taking. In the section of the House Report on the special jurisdictional statute under which we have heard this case dealing with the potential cost of the legislation, the committee stated that if "the court determines in favor of the claimants," the United States would be liable for interest totalling approximately $85 million. H.R. REP. No. 95-529, 95th Cong., 2d Sess. 6, *reprinted in* U.S. CODE CONG & AD. NEWS 767, 772 (Apr. 1978). Similarly, during debate on the legislation, Representative Udall referred to the estimated cost of $85 million if the Sioux were to prevail. 124 CONG. REC. H900 (daily ed. Feb. 9, 1978) (remarks of Representative Udall).

Congress concluded that, despite the substantial amount the government would be required to pay if the Indians should prevail on the merits of their taking claim, the Indians should receive from this court

a *de novo* determination of the merits of that question. Pursuant to that direction we have decided the case. In so doing, we have carried out the obligation Congress imposed upon us in the 1978 jurisdictional statute.

CONCLUSION

The order of the Indian Claims Commission of February 15, 1974 (1) is affirmed insofar as it held that the Act of February 28, 1877 constituted a taking of (a) the Sioux land in the Black Hills and (b) the rights-of-way acquired thereunder, but (2) is reversed insofar as it held that the removal of gold from the Great Sioux Reservation prior to February 28, 1877 constituted a taking.

NICHOLS, *Judge*, concurring:

I concur in the result and in all of the court's opinion except part III D, which discusses *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). With all respect, that part mistakes the holding in *Lone Wolf* and ignores a fundamental proposition in the law of eminent domain. I agree that defendant's reliance on *Lone Wolf* is also mistaken and that it does not establish that the acquisition of the Black Hills by the 1877 Act did not constitute a taking. But the reasons why this is so are quite other than those the court states.

Lone Wolf is of vital importance in respect to the claim before us. It was cited, and, as this court then thought, faithfully followed in *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 670 (1942), *cert. denied*, 318 U.S. 789 (1943), where the discussion of it covers most of four pages. In *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298, *cert. denied*, 423 U.S. 1016 (1975), defendant relied on the earlier decision as res judicata. We concluded that the interpretation of *Lone Wolf* there involved was fundamental to the decision and under the doctrine of res judicata, could not be challenged by us. We carefully left open the question whether, if untrammelled by res judicata, we would have construed *Lone Wolf* the same way. I myself, would not have, and would be happy, now, to join in giving it a different and more sustainable construction, as the Congress now leaves us free to do. If, however, *Lone Wolf* holds what the 1942 Court of Claims thought it held, it still stands as an insuperable bar to the claim. To dispose of it, the Congress would have to excuse us from the duty of following Supreme Court decisions, which it has not yet done.

The day *Lone Wolf* was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision. To the practical statesman, it appeared to say the Indian tribes had acquired no rights by treaty which the Congress was bound to respect. Certainly no U.S. Supreme Court post 1938 would make such a decision, and many decisions, both earlier

and later, give Indian treaties an entirely different degree of respect. But the case must be carefully read to avoid making it worse than it is. It has never been expressly overruled. We and other constitutionally "inferior" courts are not allowed to overrule Supreme Court decisions the Supreme Court has not itself expressly overruled. *United States* v. *Mason*, 412 U.S. 391 (1973). We are not required to praise them, nor to extend them beyond their precise holdings.

We must turn to *Lone Wolf*, therefore, as the 1942 Court of Claims did and the present court purportedly does (though to opposite results) and see what *Lone Wolf* really holds. Incidentally, since this court is deciding that the 1942 court was in error in its application of *Lone Wolf*, one might have expected some discussion of the 1942 decision and how it fell into the error it did. The 1942 decision clearly treated *Lone Wolf* as fully applicable as a precedent to a fifth amendment claim for just compensation, and imputed to that case a holding that in managing Indian property, Congress might exchange lands for money at any rate it chose, without its being an instance of uncompensated expropriation.

Many takers, including the United States, have sovereign immunity to unconsented suits. *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906). Thus the owner of property taken by the United States has no remedy by suit at law for just compensation, except for the consents it has given. These include the 40 U.S.C.

§ 257 procedure for condemnation of land, and the Tucker Act, now 28 U.S.C. § 1491. Where some such consent is not applicable, the landowner has no remedy except to resort to equity to enjoin the taking until just compensation, or a means of adjudicating just compensation, is provided. Such suits are not so common now but in the days when consents by our states and our nation were not so sweeping as they now are, they were very common. *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110 (1919), is an example of a successful injunction suit by Indians against uncompensated expropriation of their lands. *See* II NICHOLS, EMINENT DOMAIN (2d ed. 1921) § 472, *Injunction Against Unlawful Taking or Damage Under Color of Eminent Domain*. *Hurley* v. *Kinkaid*, 285 U.S. 95 (1932) may be taken as an example of an injunction suit where the government threatened to take but failed to provide just compensation, and that landowner lost in the Supreme Court because, unlike the Indians, he had a remedy at law under the Tucker Act.

When we realize that the Tucker Act as it then was, 24 Stat. 505, did not consent to suits by Indian tribes "founded on the Constitution" we will see that plaintiff Lone Wolf and co-plaintiffs were in precisely the situation for which the injunctive remedy was the only one available. They alleged that an Act of Congress infringed their property interests, but made no provision for just compensation, and general legislation such as the Tucker Act at that time made none.

Thus it was irrelevant whether plaintiffs would have preferred the *status quo*, or just compensation for the altering of it: in either case their sole remedy was in equity. They clearly did invoke the fifth amendment, and they clearly did assert the government was taking, or threatened to take, their property. They did not assert any other ground why the challenged statute was unconstitutional. That they said the statute would deprive them of their lands "without due process of law" instead of "without just compensation," is a semantic variation that will not suffice to alter the entire nature of the *Lone Wolf* proceeding in the manner this court would like. They were not asserting a procedural error; in those days due process had substantive applications. Shortly before *Lone Wolf*, the Supreme Court held that the due process clause of the fourteenth amendment imposed on the states an obligation to pay just compensation in taking cases, despite its not including any specific just compensation clause. *Chicago, Burlington and Quincy R.R.* v. *Chicago*, 166 U.S. 226 (1897). This case overruled *Davidson* v. *New Orleans*, 96 U.S. 97, 105 (1877), which had limited the application of the fourteenth amendment to procedural due process, so far as concerned state eminent domain. We must understand these matters to understand *Lone Wolf*.

Lone Wolf is purely and simply a holding that the fifth amendment does not require just compensation to the Indians in the situation then before the Court. Thus our 1942 court was correct in viewing *Lone*

Wolf as a precedent fully as applicable in a consented suit for just compensation, such as they had before them, as it would be in an injunction suit in the absence of the necessary consent. *Lone Wolf* was also viewed as an applicable precedent as to a just compensation claim as late as *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968), so far as applied to instances where the government made a "good faith effort" to give the Indians the full value of their land, though it was not judicially ascertained as the fifth amendment, if applicable, would have required. In such a case there was no taking even if the compensation was insufficient. In instances where we could see no "good faith effort," *Lone Wolf* was not viewed as a governing precedent, but no such reason for distinguishing it was suggested, as is now asserted. We quoted *Lone Wolf* to the effect that a mere change in the form of investment of Indian tribal property from land to money was not a taking. If *Lone Wolf* was not applicable to just compensation claims at all, much cerebral effort was wasted on it in the *Fort Berthold* case.

Lone Wolf did undoubtedly say that when Congress "purported" (the Court's word, at p. 568) to give an adequate consideration in any such exchange, it was not permissible to go behind its fact finding to ask if the consideration really was adequate, nor could the Court inquire into the evil motives that might be secretly lurking in congressional breasts.

The latter proposition has not changed in recent times. Thus in *United States* v. *O'Brien*, 391 U.S. 367 (1968), it was held that when it is necessary for construction of legislation to determine its intent and purpose, that is to be done by resort to sources such as committee reports, where the Congress makes its purpose manifest. It is not permissible to strike down legislation "on the basis of an alleged illicit legislative motive." *Id.* at 383, citing cases. In that case the alleged illicit motive was assertedly proved from member's speeches on the floor, which the Court held could not be imputed to the whole body. Plaintiff O'Brien did not even assert that it might be done by their off-the-record remarks.

The meaning both of *Lone Wolf* and of *O'Brien* is that if the Congress spreads evidence on the public record, *i.e.*, "purports" to act in a fair and constitutional manner, this may not be refuted by unsupported inference, by gossip, or by hearsay.

As a matter of history, it may be noted that the Indians in *Fort Berthold*, *supra*, took this court's "good faith effort" standard as an invitation to impugn the good faith of Congress in further remanded stages of the same case. The Indians Claims Commission rejected such evidence, 28 Ind. Cl. Comm. 264 (1972), as did we on appeal. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 204 Ct. Cl. 831, *cert. denied*, 419 U.S. 901 (1974). So the "good faith effort" standard must be applied with respect to the legislative record as

publicly disclosed in the statutory language, committee reports, etc. The "good faith effort" standard is met in *Lone Wolf*, where the record shows that the Indians' complaints were considered by Congress and that an effort was made to meet them half way, the deal originally proposed for the Indians being materially improved in the final act. In long subsequent Indian Claims Commission proceedings it was held that under the legislation the government acquired at 93.3 cents an acre land worth $2 an acre. *Kiowa, Comanche and Apache Tribes* v. *United States*, 143 Ct. Cl. 534, 163 F.2d 603 (1958) *cert. denied*, 359 U.S. 934 (1959). However, in *Fort Berthold, supra*, there was likewise a gap between what the United States paid and the Commission determined; a greater one than in *Lone Wolf*. So it is clear the occurrence of a "good faith effort" is not to be tested by the congruence of the amount paid with the amount subsequently found by hindsight as what should have been paid.

In *Lane* v. *Pueblo of Santa Rosa, supra*, at 113, the Supreme Court said:

> The defendants assert with much earnestness that the Indians of this pueblo are wards of the United States—recognized as such by the legislative and executive departments—and that in consequence the disposal of their lands is not within their own control, but subject to such regulations as Congress may prescribe for their benefit and protection. Assuming, without so deciding, that this is all true, we think it has no real bearing on the point we are considering.

> Certainly it would not justify the defendants in treating the lands of these Indians—to which, according to the bill, they have a complete and perfect title—as public lands of the United States and disposing of the same under the public land laws. That would not be an exercise of guardianship, but an act of confiscation. * * * [Footnote omitted, cites *Lone Wolf* v. *Hitchcock*, with other cases.]

In a consented suit, before *Lone Wolf*, the Supreme Court held the government accountable for selling to homesteaders land granted by treaty to Indians. *New York Indians* v. *United States*, 170 U.S. 1 (1898); 173 U.S. 464 (1899). *Lone Wolf* is not and never was to be read as sanctioning any arbitrary move the Congress may choose to make with respect to property rights of Indians created by an Indian treaty. It sanctions, as not violative of the fifth amendment, only such moves as are "purported" (*i.e.*, shown by the published record) to provide an "adequate consideration" in any exchange of lands for anything else. I think this court in 1942 failed to note this limitation on the scope of the *Lone Wolf* holding and thus it committed error. The error does not bind us by res judicata, and I think the new analysis we now make, in the parts of the opinion I join, reveals a situation where Congress did not "purport" to provide "adequate consideration," nor was there any meaningful negotiation or arm's-length bargaining, nor did Congress consider it was paying a fair price. The case is not one we can say the

Lone Wolf Court would deem no violation of the fifth amendment. It was never before the Court and we cannot tell how it would have viewed the case. The congressional decision fails the "good faith effort" test that we enunciated as explanatory of *Lone Wolf*.

BENNETT, *Judge*, with whom KUNZIG, *Judge*, joins, dissenting:

This court today has adjudged that the acquisition of the Black Hills from the Sioux Indians by the United States, pursuant to the Act of February 28, 1877, 19 Stat. 254, was a taking under the fifth amendment of the Constitution of the United States. By doing so, the court has concluded that the unanimous decision of the entire court in *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943), which held that the acquisition in question did not constitute a fifth amendment taking and that the Indians had already been paid, was incorrectly decided, although this result was later twice affirmed. *Sioux Tribe of Indians* v. *United States*, 146 F.Supp. 229 (Ct. Cl. 1956), *vacated and remanded for further proof* (see 182 Ct. Cl. 912 (1968); *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298 (1975), *cert. denied*, 423 U.S. 1016 (1975). In reaching this result, I believe that the majority has misconstrued the law as laid down by decisions of the United States Supreme Court.

The majority has placed its principal reliance on this court's decision in *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F.2d 686 (1968), which held that the sole factor in determining whether Congress had taken Indian tribal land in violation of the fifth amendment was whether Congress had or had not made "a good faith effort to give the Indians the full value of the land." *Fort Berthold*, *supra*, 182 Ct. Cl. at 553, 390 F.2d at 691. Upon the basis of the history of the acquisition as depicted in the congressional records, the majority has found that Congress had not made such a good faith effort when it acquired the Black Hills from the Sioux. Further, the majority, in following *Fort Berthold's* test, contends that the Supreme Court's decision in *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), has no relevance to the question of a fifth amendment taking of Indian tribal land. I respectfully disagree.

Decision of this case requires a careful examination of the scope of the pertinent Supreme Court precedents in this area. The first is *Lone Wolf* v. *Hitchcock*, *supra*, and, initially, I note my agreement with the view expressed in Judge Nichols' concurring opinion, contrary to the reasoning of the court's opinion, that *Lone Wolf* is a precedent applicable to a suit brought for just compensation for an alleged taking of Indian tribal property and that Congress has not excused us from following it. The underlying facts of that case, which the majority admits "were some-

what similar to those here," were as follows. The Indian tribes' rights in certain lands, set apart for them in a reservation, had been recognized in a treaty with the United States. The treaty provided that these lands could not be disposed of without the consent of three-fourths of the tribes' members. Congress negotiated an agreement with the tribes for the allotment of land to individual Indians and the sale of unallotted or surplus lands to settlers. Congress became aware that the requisite number of Indians had not signed the agreement. The Indians protested to Congress that their agreement had been obtained by fraudulent misrepresentations and false promises and that they had been promised much more for the surplus lands by the agents of the Government than the agreement allowed. The agreement, however, with several modifications, but without any change in the amount of compensation for the surplus lands, was enacted by Congress into law.

The Indians immediately went to court seeking an injunction restraining the Government from carrying out an unconstitutional deprivation of property rights. The Indians alleged that the value the statute assigned to the surplus lands was far below the land's actual value and that the statute, if carried out, would result in an unconstitutional taking of their property rights and would deprive the Indians of their property rights without due process of law.

The Court sustained the constitutionality of the statute under Congress' plenary authority over In-

dian affairs.[1] The Court held that the exercise of plenary authority was deemed political, not subject to control by the judiciary. Thus, the Court would not and could not examine the charges that Congress had wrongfully exercised its power.

I believe that Judge Nichols, in his concurring opinion, has properly stressed the importance of placing old cases within their historical perspective in order to understand just what in fact they held so that their implications can be properly assessed. *Lone Wolf's* ruling on due process has substantive aspects which directly relate to the "taking" clause of the fifth amendment as it relates to Indian tribal land.

The due process clause, "nor [shall any person] be deprived of life, liberty, or property, without due process of law," is broader than the eminent domain clause of the fifth amendment, "nor shall private property be taken for public use, without just compensation," and necessarily includes the more specific part. I NICHOLS, EMINENT DOMAIN § 4.3 (3d ed. 1976). A holding that a statute does not violate due

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[1] The only provision in the Constitution specifically dealing with Indians is found in U.S. CONST. art I, § 8, cl. 3, which grants Congress the power:

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

In *United States* v. *Kagama*, 118 U.S. 375 (1886), however, the Court recognized that the Federal Government's power over Indian affairs is broader than this provision, being derived from the inherent duty to protect and foster these dependent people.

process implicitly includes the holding that the eminent domain clause has not been violated.

A difference between the eminent domain and due process protections of significance here is that the eminent domain clause is a *restriction* on government's inherent power to take property for *public* use; whereas due process is also a *prohibition* on the Government from taking property for *private* use of third parties. I NICHOLS, *supra* ¶ 4.7. This may very well explain why plaintiffs in *Lone Wolf* grounded their claim on the due process clause, for the purpose of the appropriation, sale of the tribal land to settlers, might well be considered a private use. Both under eminent domain and due process, however, when the illegal act is already accomplished and cannot be prevented, the plaintiff is entitled to just compensation which includes interest.

There was, however, no discussion in *Lone Wolf* of the relation between due process and Congress' plenary power over Indian affairs. The Court simply concluded that the statute was supported by Congress' plenary power which "has always been deemed a political one, not subject to be controlled by the judicial department of the government." *Lone Wolf* v. *Hitchcock, supra,* 187 U.S. at 565. The Court "must presume that Congress acted in perfect good faith * * *. *In any event,* as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation." [Emphasis added.] *Id.* at 568.

The sense of the opinion seems to be that Indian tribal property is simply not protected by the fifth amendment. It may be that the thought then was that due process protects only "persons" and "private property" and that Indian tribes were not "persons" and Indian tribal property, owned communally, was not private property. *See Choate* v. *Trapp,* 224 U.S. 665 (1912), and *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902), for the relevance of the distinction between individual Indian land versus Indian tribal land as it relates to due process. What the majority fails to consider is that *Lone Wolf* held that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation.

Subsequent to *Lone Wolf,* the Supreme Court did recognize that the power of Congress to dispose of Indian tribal property was subject to the fifth amendment. *See United States* v. *Klamath & Moadoc Tribes,* 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States,* 299 U.S. 476 (1937); *United States* v. *Creek Nation,* 295 U.S. 103 (1935); *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919). In *Pueblo of Santa Rosa,* the Indians sought an injunction to prevent the Secretary of the Interior from selling certain lands as public lands to settlers, which lands were claimed by the Indians under title recognized by the United States. The Court ruled that there would be a threatened unconstitutional taking and that the Indians would be entitled to an injunction

if Congress had recognized the Indians' title to the lands in question, and the Court remanded the case for a determination of that issue.[2] In *Creek Nation*, certain tribal lands were classified as public lands by an erroneous survey and were sold by the United States to settlers. With full knowledge of the facts, the United States refused to cancel the sales and retained all the benefits it had received from the sales. In *Shoshone Tribe*, Government agents gave tribal lands to other Indians. Congress later ratified this tortious act and recognized the other Indians' title. In *Klamath and Moadoc Tribes*, the United States gave individual Indian lands to a state government for roads. Realizing its mistake, the United States transferred Indian tribal lands to the state in exchange for the individual Indian lands. Several years later, the United States paid the tribes some money for the release of their claim. Two cases with similar facts can be added to this collection—*Uintah and White River Bands of Ute Indians* v. *United States*, 139 Ct. Cl. 1, 152 F.Supp. 953 (1957), and *Seminole Nation* v. *United States*, 102 Ct. Cl. 565 (1944), *cert. denied*, 326 U.S. 719 (1945). Thus, a similar fact pattern emerges in every case: at the time Indian tribal land was appropriated (or appropriation was threatened) by the United States, tribal land

[2] It is well settled that Indians have a protected property interest only in lands held under title recognized by the United States and not for lands held under aboriginal title. *See, e.g., Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

was treated as if it had been the United States' own and no compensation of any form was rendered or even contemplated. The majority, in attempting to support its position, denies this fact by claiming that the Supreme Court has found a taking in one case where some compensation was paid at the time of the acquisition. The majority states:

> This has been done where no compensation was originally paid and where the initial compensation was grossly inadequate.[7]

[7] In *United States* v. *Klamath and Moadoc Tribes of Indians*, 304 U.S. 119 (1938), the United States paid $108,750 in related parts of a single transaction (*see Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cl. 451, 457-58 (1937) for Indian land which this court later found to have been worth $2,980,000. The Supreme Court held that there was a constitutional taking for which just compensation had to be paid, including interest. *See* 304 U.S. at 122, 123-25.

The statement is correct where it says that the Supreme Court has found a taking "where no consideration was originally paid" at the time of the appropriation of land.

The second proposition stated, that the Supreme Court has required payment for a taking "where the initial compensation was grossly inadequate," is bolstered by the cites to *United States* v. *Klamath and Moadoc Tribes of Indians*, 304 U.S. 119 (1938), and *Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cl. 451, 457-58 (1937), and the statement that "the United States paid $108,750 in related parts of a single transaction * * * for Indian land."

In other words, the taking and payment are suggested to have been just one big transaction and that the United States paid the tribes some compensation at the time of the acquisition.

The facts as found by the Court of Claims do not bear out this conclusion at all. *Klamath and Moadoc Tribes* v. *United States*, 85 Ct. Cl. 451, 457-58 (1937). On June 21, 1906, Congress authorized the Secretary of the Interior to give Indian tribal lands in exchange for individual Indian lands it had improperly sold to third parties many years before. The Secretary did convey these lands on August 22, 1906 (the date of taking). "This was done without the knowledge or consent of the plaintiffs *and without making compensation.*" [Emphasis added.] *Id.* at 457. *Thereafter*, on November 2, 1907, the Secretary recommended that $108,750 be appropriated " 'to compensate them for the lands taken.' " *Id.* at 457. Prodded by this recommendation the Congress on April 30, 1908, did appropriate that sum " 'or so much thereof as may be necessary, to pay the Indians * * * for the lands.' " Such payment was conditioned, however, upon an execution by the Indians of " 'a release of any claims and demands of every kind against the United States for the land involved.' " *Id.* at 458; 35 Stat. 70, 92 (1908).

As summarized by the Supreme Court, "[t]hat transfer [the transfer of the tribal lands] was made without the knowledge or consent of plaintiffs and *without giving them any compensation* for the lands so taken from their reservation. *Later*, however, the

United States paid them *$108,750 for which they released their claim.*" [Emphasis added.] *United States* v. *Klamath and Moadoc Tribes*, *supra*, 304 U.S. at 122.

The actions of Congress were thus not a single transaction but discrete, separate acts, evidenced by separate statutes and developments mentioned in the findings. Compensation was neither rendered nor was any obligation to render any compensation assumed when Congress gave the land in question to others. Therefore, the precedents given do not support the proposition for which they are used. The cases simply stand for the reasonable rule that Congress cannot prevent the legal consequences of its acts by rendering compensation well after the fact, if that payment is not just compensation.

In each of these cases, the courts held that the Government was required to pay just compensation for the taking of Indian tribal property, which was held by recognized title. The Supreme Court did not deny that Congress had plenary authority over Indian tribal property, but found that the exercise of this power was subject to constitutional restraints. The fullest exposition of this doctrine is found in *United States* v. *Creek Nation*, *supra*, 295 U.S. at 109-10, where it said:

> * * * The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and

manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307-308.

It is within the framework of these opinions that this court decided *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, *supra*, which is the basis of the majority's decision that the acquisition of the Black Hills was a compensable taking under the fifth amendment. *Fort Berthold* attempted the difficult task of reconciling the various precedents in the area. The court concluded that the question to be determined was whether Congress, in disposing of tribal property, was exercising its power of eminent domain or its plenary power.

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with re-

> gard to Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time. [182 Ct. Cl. at 553, 390 F.2d at 691.]

The court examined the pertinent precedents to find a clue to a standard by which the court could determine which "hat" Congress was wearing. Looking at the factual situation presented in *Lone Wolf*, the court found that Congress had made a good faith effort to give the Indians fair value for their lands. Thus, the court concluded that it must be the presence of this effort that made the disposition an exercise of plenary power and not a taking. Looking at the factual situations presented in the precedents that had found a taking, the court noted the absence of a good faith effort to give the Indians fair value for their lands. Concomitantly, the court decided that the absence of this effort indicates an exercise of the power of eminent domain. In essence, the court concluded that the elusive presence of this good faith effort as found on the facts of *Lone Wolf*, showed that Congress was acting as a guardian of Indian affairs. The absence of facts similar to those of *Lone Wolf* demonstrated that Congress was acting as a taker. The factual situations presented in *Pueblo of Santa Rosa* and its progeny, however, are poles apart from that of *Lone Wolf*, and the good faith effort standard does not adequately deal with the disparity of the facts nor with the legal distinctions present therein.

The cases which actually held that there had been a taking must be examined both for the Court's legal approach and its relation to the facts before the Court. In *Creek Nation*, the Court simply stated that the exercise of plenary power is subject to constitutional restrictions. Such could be read very expansively, *i.e.*, that Congress can never deprive Indian tribes of their property without rendering or assuming the obligation to render just compensation. In light of the fact that the Court never overruled, limited, or distinguished *Lone Wolf*, however, such a broad interpretation is clearly unwarranted. Viewing the specific facts of the cases, we know only that an unconstitutional taking occurs when the land is treated as if it were the property of the United States without any regard or recognition of the property rights of the Indian tribes.

Once the United States recognizes that certain property belongs to Indian tribes, and that the United States must acquire it from those tribes and provide the tribes with something in return, as was the case in *Fort Berthold* and in our instant case, *Pueblo of Santa Rosa* and its progeny simply do not answer the question of whether there has been a taking. *Fort Berthold* postulates that a court may examine the good faith of Congress in acquiring the property to determine if a taking has occurred. Application of such a standard is at odds with *Lone Wolf*, which clearly provided that though there was a moral obligation to act in good faith, since "Congress possessed full power in the matter, the judiciary cannot

question or inquire into the motives which prompted the enactment of this legislation." *Lone Wolf* v. *Hitchcock*, *supra*, 187 U.S. at 568. *Fort Berthold* adopts a standard of review that would overrule *Lone Wolf*, and this cannot be done by a lower court.

The majority, however, solves this problem by simply contending that *Lone Wolf* has nothing to do with the taking clause. The majority is the first court to do this. Illogically, however, the majority has adopted the *Fort Berthold* standard which was derived from a review of pertinent taking precedents, of which *Lone Wolf* was one. Further, I believe that the majority has shown its awareness of the hazards attendant to delving into the good faith and decision-making process of a past Congress by stressing, in its evaluation of the question of Congress' good faith in acquiring the Black Hills, the pronouncements of official legislative records. Carried to its logical extreme, if Congress "purports" in official records to give fair value, good faith is established no matter how insufficient the compensation was that Congress paid for the land.

The test laid down by *Fort Berthold* contradicts itself by its own terms. The court there provided:

> * * * Where Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking. This is a mere substitution of assets or change of form and is a traditional function of a trustee. * * * [182 Ct. Cl. at 553, 390 F.2d at 691.]

How can it be said that Congress is simply performing the traditional function of a trustee when it disposes of Indian tribal property for a grossly inadequate amount? This was the standard applied and found to be satisfied in *Fort Berthold* when Congress exchanged Indian tribal land for approximately 40 percent of its fair market value. Under *Fort Berthold's* analysis, good faith was found in *Lone Wolf* where in the follow-up case, *Kiowa, Comanche and Apache Tribes* v. *United States*, 143 Ct. Cl. 534, 166 F.Supp. 939 (1958), *cert. denied*, 359 U.S. 934 (1959), the amount paid in exchange was less than 50 percent of the land's fair market value. The standard makes a mockery out of the fifth amendment protections it purports to extend to the tribes, making its effectiveness dependent on an abstract, insubstantial finding.

Nor has Fort Berthold's liberalized standard had much significance in forming the basis for judgments in favor of Indians up until this case. In *Fort Berthold* itself, the standard justified judgment for the Indians only on one claim out of many alleged. This was for land (school land) purchased by the United States at a fixed price per acre to be given to state governments for educational purposes. A member of *Fort Berthold's* majority in a later review of that case suggested that this holding was wrong. *Three Affiliated Tribes of Fort Berthold* v. *United States*, 204 Ct. Cl. 831, 833-34, *cert. denied*, 419 U.S. 901 (1974). In *Confederated Salish and Kootenai Tribes* v. *United States*, 193 Ct. Cl. 801,

437 F.2d 458 (1971), a similar holding on school lands was rendered on the basis of *Fort Berthold*. Also, a taking was found when the United States acquired land for a national bison range, had an independent appraisal of the land, and paid the full appraised value. I simply cannot see how this failed *Fort Berthold's* good faith test. In *Klamath and Modoc Tribes* v. *United States*, 193 Ct. Cl. 436 F.2d 1008, *cert. denied sub nom. Anderson* v. *United States*, 404 U.S. 950 (1971), the defendant conceded that land acquired by the United States had been taken in violation of the Constitution. The court commented that the concession was correct because when the United States acquires for its own benefit it is always a taking. This dicta has been repudiated by the majority today and we agree. For, whether the United States acquires for itself or for third parties, it is the power of the United States that has made possible the unconsented appropriation. Thus, if we were to analyze *Klamath and Modoc Tribes* today as the majority would have us do, we would arrive at the startling result that when land is appraised and sold to third parties at the appraised value, good faith is demonstrated, while if the United States pays that same appraised value, good faith is lacking.

The law the Supreme Court has laid down governing the legal rights of Indian tribes guaranteed by the fifth amendment is at best ambiguous. I believe that courts must be careful in construing ambiguous binding precedents where the results of liberal con-

struction are enormous judgments against the United States. *Cf. United States* v. *Zazove*, 334 U.S. 602, 617 (1948); *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922); *Schellfeffer* v. *United States*, 170 Ct. Cl. 178, 343 F.2d 936 (1965). Though it is quite possible current popular attitudes concerning the relationship between due process and Congress' plenary power over Indian tribal property have changed in favor of the extension of the constitutional protections, it is not this court's function to advance these attitudes when such an approach cannot be implied without emasculation of Supreme Court precedents.[3] Further, *Fort Berthold* is an example of the unsatisfactory or illogical results that are reached when trying to liberalize ambiguous precedent, for the good faith test itself does not achieve a proper approach to the delicate relationship between due process and plenary power. Thus, *Fort Berthold* is not a proper statement of the law and should be overruled.

The law we should apply is that once Congress has, through negotiation or statute, recognized the Indian tribes' rights in the property, has disposed of it, and has given value to the Indians for it, that is

[3] The extreme to which the court goes in undoing the Supreme Court's decision in *Lone Wolf* is illustrated by its need to rely on a dissenting opinion of the Court of Claims where this issue was not even presented as authority to modify the *Lone Wolf* principle that courts cannot examine the adequacy of the consideration Congress gives for Indian lands taken. *United States* v. *Sioux Nation, supra*, 207 Ct. Cl. at 250, 518 F.2d at 1307.

the end of the matter. Courts should not and cannot investigate and rule on the good faith of Congress in enacting legislation, as the majority opinion does here. The separation-of-powers doctrine, bedrock of our Constitution, is offended by so doing. It would be the same if Congress questioned the good faith of this court's decisions. Of course, it will be contended that unless we can review the good faith of Congress in what it does we will be allowing it absolute power to ride roughshod over the Constitution. Constitutional questions, however, are not properly resolved by the fuzzy test of good faith. In this instance, Congress exercised its own oversight and recognized a breach of its moral obligations in 1877. Since 1946, when Congress established the Indian Claims Commission, it has made available a remedy to right moral wrongs to Indians. The Sioux Nation availed itself of that remedy to recover $17,553,484 for breach of the moral duty of Congress to them in this particular instance. We have affirmed that judgment. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234, 518 F.2d 1298, *cert. denied*, 423 U.S. 1016 (1975).

The conclusion of the majority is that the disposition of the Black Hills in exchange for 900,000 acres of land and a promise to supply rations "until the Indians are able to support themselves," could not be an exercise of Congress' plenary power over Indian affairs to foster and protect these people because the official pronouncements of Congress do not explicitly demonstrate that it equated the value of the consider-

ation with the value of the land. Thus, the court presumed utmost bad faith and indifference to the best interests of the Indians. The majority retreats somewhat from its sole reliance on official records as dispositive of Congress' good faith effort in asserting that "an essential element of the inquiry under the *Fort Berthold* guideline is determining the adequacy of the consideration the government gave for the Indian lands it acquired." Neither the Supreme Court nor the Court of Claims has ever examined the adequacy of the consideration given in exchange in order to determine if there has been a taking and this is directly contrary to *Fort Berthold's* holding.[4] In any event, turning from official pronouncements to what Congress actually did, a much different picture emerges. Prior to the acquisition of the Black Hills, Congress had obligated itself by the treaty of 1868 to supply food to the Sioux for 4 years. The expenditure for these rations was over $5 million. Once this treaty obligation had ended, Congress continued gratuitously to supply food for fiscal years 1874 and 1875 at the cost of $2,350,000. In 1875, the Secretary of the Interior suggested that Congress might *continue* the rations in the future *in consideration* of certain property concessions by the tribes. It is significant that the report of the Committee on Indian Affairs of March 15, 1876, accompanied a bill which provided for the Allison Commission to negotiate with the Sioux for cession of the Black Hills in re-

[4] *See* note 3 *supra*.

turn for which the United States would provide the Indians with subsistence for not more than 10 years. Based on prior experience, at a cost of one and one-quarter million dollars a year, certainly the Senate committee contemplated a substantial consideration of around $12 million which could be committed to the Indians by the Allison Commission. This $12 million is not so far off from the value of the Black Hills found by the Indian Claims Commission in 1976.

Congress, therefore, was well aware of the past cost of the obligation to feed the Sioux and it is obvious that this cost was reasonable evidence to Congress of the magnitude of the obligation to supply rations. Congress, however, went far beyond the Senate committee's recommendation to supply food for 10 years and assumed an open-ended obligation in exchange for the Black Hills in the 1877 Act. The majority's view that the rations were not consideration for the Black Hills is untenable. What else was the money for? Such an obligation by the United States Government, though it might be difficult to value in terms of the marketplace at that time, has been of inestimable value to the Indians. Performance of this promise spanned several generations and in dollar terms was many times the Indian Claims Commission's valuation of the lands acquired by the United States.[5] The court has admitted as much.

[5] An 8-volume report by the General Accounting Office, numbering over 4,300 pages, accounts for over $109 million disbursed to the Sioux up to June 30, 1925. Of this amount, $36,930,367 represented charges against the 1877 Act and,

Congress added to the Sioux reservation 900,000 acres of land as well, in exchange for the Black Hills. Where is there evidence showing that Congress did *not* believe, based on its judgment, that this exchange of land for food, rations, provisions, and other land was in the best interests of the Sioux? And yet, the majority determines that Congress was not properly exercising its plenary powers to foster and protect the Sioux in this instance, while it was in *Fort Berthold* and *Kiowa, Comanche and Apache Tribes*, where it exchanged tribal land for less than half of its fair market value!

The large judgment previously rendered in favor of the Sioux under the "fair and honorable" dealings section of the Indian Claims Commission Act, 25 U.S.C. §§ 70-70w, was for the *full* value of the Black Hills and other claims. Congress, by legislation, 88 Stat. 1499, 1500 (1974), 92 Stat. 153 (1978), has provided that the value of the food, rations, and provisions, which are otherwise properly an offset to this judgment, will not be taken into consideration as payment on the claims. The court goes another step and quite properly declares that, while there can be no such offset, the same statutes do not bar the cost of food, rations, and provisions from being treated as consideration for the land, though it improperly, I

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in addition, there was almost $16 million in gratuities. The record before us does not bring these costs up to date. The majority opinion states that the Government has expended $43 million on rations and provisions for the Sioux but does not state for what period. Defendant uses a figure of $57 million.

think, concludes that these millions were not consideration. Thus, under statutory authority, the Sioux tribes are entitled to, and will receive, $17,553,484, which was the amount granted by the 1976 judgment of the commission affirmed by this court. However, Congress has never permitted the award of interest on such statutory or moral claims, though it certainly could have. Therefore, this court is only authorized to grant interest on the claim upon a finding of a constitutional violation under decisional law. The court now holds, based on very ambiguous precedent, that the Indians are entitled to extra compensation in the form of simple interest at the rate of 5 percent for over 102 years for a "taking." This results in a staggering judgment of approximately $105,000,000. Such a judgment is the product of a distorted conception of the precedents, as I have shown.

A proper result reached by strict application of the Supreme Court's decisions, which would determine that the claim is solely statutory, would not prevent these Indians from receiving a major judgment for a moral claim. This is not a case where the court must stretch in order that plaintiffs can recover at all. The circumstance which demonstrates a clear wrong in terms of today's perceptions of what is moral, fair, and honorable, presented here a claim under the Indian Claims Commission Act on which the Indians have prevailed. If Congress thinks that plaintiffs are entitled to more money for the wrong their ancesters suffered, it can make such an award

as a gratuity. This would be in further hindsight redress of its behavior 102 years ago in exercise of its plenary powers to bring peace to the Black Hills under difficult circumstances we can today hardly appreciate. But, there is just no clear and reliable precedent for the court to find a taking, which would provide plaintiffs approximately $90 million additional in interest, as a matter of law. The court has said before, in well-considered opinions which the Supreme Court declined to review, that there was no taking here. The facts have not changed. We have been offered no new evidence. There is no justification for appearing to yield now to pressure in this matter to cloak an award with the trappings of judicial authority that does not clearly exist. The separation of powers militates against it. I reject the court's holding that its result is legally mandated. Plaintiffs have been paid twice on their claim: first, by the 1876-77 Congress and its successors in providing the huge subsistence payments and, second, by being given full value for their rights in a judgment by the Indian Claims Commission, which we have affirmed, and the defendant does not now contest.

For all of these reasons, I respectfully dissent from the opinion and judgment of the court, except for part V of the opinion which rejects plaintiff's claim that removal of gold by trespassing miners was a taking by, or ratified by, the United States.

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

No. 148-78

SIOUX NATION OF INDIANS, ET AL.*

v.

THE UNITED STATES

July 31, 1979

ORDER

This case came before the court on appeal from the Indian Claims Commission under a special jurisdictional statute on the issue of whether the Commission had correctly held that an 1877 statute under which the United States acquired certain lands from the Sioux Indians constituted a taking of those lands for which the United States was required to pay just compensation under the fifth amendment and that the fair market value of the land and other interests in it that the government thus acquired

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*** Cheyenne River Sioux Tribe, Sioux Tribe of the Fort Peck Reservation Montana, Pine Ridge Sioux Tribe, Rosebud Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, Santee Sioux Tribe and Standing Rock Sioux Tribe.**

was $17,553,484, which included the sum of $450,000 for gold that miners took from the land before the 1877 statute. Establishment of a taking by the government would not only create its liability for the value of the property taken but also for interest from the date of taking.

On June 13, 1979, the court entered its decision affirming the order of the Indian Claims Commission on February 15, 1974 insofar as it held that the Act of February 28, 1877 constituted a taking of the Sioux land in the Black Hills and the rights-of-way acquired thereunder, but reversing said order insofar as it held that the removal of gold from the Great Sioux Reservation prior to February 28, 1877 constituted a taking.

The case now comes before the court on plaintiffs' motion, filed July 3, 1979, moving the court "for the entry of judgment pursuant to the opinion and decision of the court of June 13, 1979, in the sum of $17,553,484, plus interest as a measure of just compensation at the rate of 5 percent per annum on the sum of $17,103,484 of said sum of $17,553,484, from February 28, 1877 to the date of payment." On July 20, 1979, defendant filed a response stating "that it has no objection to the entry of judgment as proposed by plaintiffs' motion of July 3, 1979" with the understanding "that the judgment will encompass all claims in No. 148-78 and in its predecessor case, Docket No. 74-B, before the Indian Claims Commission and that the judgment will be subject to the parties' right to seek review from the court's determination of June 13, 1979." On July 24, 1979, plaintiffs filed a reply confirming agreement to defendant's said understanding. Upon consideration thereof, without oral argument,

IT IS CONCLUDED AND ORDERED, on the basis of the above and the decision of this court of June 13, 1979, that plaintiffs' said motion for entry of judgment be and the same is granted to the extent that judgment is entered for plaintiffs for seventeen million five hundred fifty-three thousand four hundred eighty-four dollars ($17,553,484) plus interest as a measure of just compensation at the rate of 5 percent per annum on the sum of $17,103,484 of said sum of $17,553,484 from February 28, 1877, to the date of payment.

This judgment will encompass all claims in No. 148-78 and in its predecessor case, Docket No. 74-B, before the Indian Claims Commission and it will be subject to the parties' right to seek review from the court's determinations on June 13, 1979.

BY THE COURT

/s/ Oscar H. Davis
OSCAR H. DAVIS
Acting Chief Judge

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Supreme Court, U. S.
FILED
FEB 11 1980

APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA,
PETITIONER

—*v.*—

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 17, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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HR. 3478, 44th Cong., 1st Sess. (May 18, 1876) 328b

S. 590, 44th Cong., 1st Sess. (June 15, 1876) 328e

Act of August 15, 1876, 19 Stat. 176 329

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Act of March 13, 1978, Pub. L. No. 95-403, 92 Stat. 153 348

Order Allowing Certiorari 349

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The following opinions, decisions, judgments, and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed petition for certiorari:

Opinion of the Court of Claims, Docket No. 148-78, dated June 13, 1979 ..... 1a-70a

Order of the Court of Claims, Docket No. 148-78, dated July 31, 1979 ..... 71a-73a

RELEVANT DOCKET ENTRIES

Court of Claims No. 148-78

April 7, 1978	Application of Sioux Nation for Review pursuant to Public Law 95-243.
April 10, 1978	Filing fee of $10 paid by plaintiffs.
April 12, 1978	Indian Claims Commission Record Docket No. 74-B (consisting of two volumes and ten boxes) filed. Notice to parties. (see clerk's letter in file).
April 18, 1978	Notice of reference to Trial Judge Thomas J. Lydon filed. Copy to parties.
October 19, 1978	Trial judge's order under Rule 14(b)(2) [reference to trial judge suspended and forwarded to the court] filed. Copy to parties.
November 27, 1978	Argued and submitted on the briefs pursuant to a Special Act [before, Friedman, Cowen, Davis, Nichols, Kunzig, Bennett and Smith, sitting en banc. Plaintiff to file supplemental memorandum within 10 days to which defendant may respond within 10 days.
June 13, 1979	The opinion of the Indian Claims Commission of February 15, 1974, is affirmed in part and reversed in part as set forth in the opinions. Opinion by the Chief Judge. Concurring opinion by Judge Nichols. Dissenting opinion by Judge Bennett in which Judge Kunzig joins. Copy to parties.
July 3, 1979	Plaintiff's motion for entry of judgment filed. Copies (2) to deft.
July 31, 1979	Court filed order entering judgment for plaintiffs in the amount of $17,553,484 plus interest as a measure of just compensation at the rate of 5 percent per annum on the sum of $17,103,484 of said sum of $17,553,484 from February 28, 1877, to the date of payment as set forth in the order. Copy to parties.

RELEVANT DOCKET ENTRIES

INDIANS CLAIMS COMMISSION DOCKET NO. 74-B

November 4, 1960	Plaintiffs, AMENDED PETITION
January 30, 1962	Commission's Order Denying Petitioners' Motion for Definition of Issues and Denying Defendant's Motion to Dismiss Docket 74-B
November 14, 1968	Commission's Order Setting Case For Hearing
June 28, 1966	Answer to Amended Petition
October 29, 1968	Commission's Order Setting Questions for Determination
November 30, 1970	Commission's Opinion and Order Amending Interlocutory Order and Denying Other Motions (24 Ind. Cl. Comm. 98-106)
September 13, 1972	Commission's Opinion and Order Denying Motion To Dismiss All Claims But One For Lack of Jurisdiction, (28 Ind. Cl. Comm. 425-432).
September 22, 1972	Plaintiffs, Amendment to Amended Petition
November 29, 1972	Commission's Opinion and Order
February 15, 1974	Commission's Opinion, Dissent in Part by Chairman Kuykendall, Findings of Fact, and Interlocutory Order (33 Ind. Cl. Comm. 151-363).
May 13, 1974	Defendant's Notice of Appeal
June 25, 1975	Court of Claims Brief [Order]
December 8, 1975	United States Supreme Court Order
May 19, 1976	Commissioner's Report
April 3, 1978	Plaintiff's Notice of Application for Review

RELEVANT DOCKET ENTRIES

INDIAN CLAIMS COMMISSION DOCKET NO. 74

August 15, 1950	20 copies of printed petition.
February 20, 1951	Answer
April 5, 1954	Opinion of Commission; Findings of fact, filed. Order entered, dismissing petition (J. 433).
June 3, 1955	Plaintiffs notice of appeal filed. Copies mailed to Ralph A. Barney, Dept. of Justice
November 7, 1956	Affirming opinion of Court of Claims.
November 6, 1958	Order November 5, 1958 from Court of Claims remanding case for further consideration on motion by petitioners for new trial and motion to vacate judgment entered November 7, 1956.
November 19, 1958	Order reopening proof and to reconsider decision and order of April 5, 1954, on such proof and record already made (J. 670).
May 11, 1960	Motion for Leave to Amend Petition
September 21, 1960	Plaintiffs motion to amend amended petitions.
November 4, 1960	Order allowing amendment of petition Dkt 74-A (J. 772).
March 23, 1966	Defendant's Motion for Clarification of Record
May 17, 1966	Petitioners' Answer to Defendant's Motion
May 25, 1966	Order designating separate docket numbers (J-1070).
July 8, 1970	Commission's Opinion on Scope and Meaning of Article 11 and 16 of the 1968 Treaty
July 23, 1970	Plaintiffs' Motion for Modification of Interlocutory Order

General Accounting Office Report filed as Exhibit in Court of Claims No. C-531 (1942 case) and filed as claimants' Exhibit No. 3 in Docket No. 74 of the Indian Claims Commission

VOLUME II
(pages 824-892)

The following letter from Colonel E.S. Stanley, Commanding the Middle District, Department of Dakota, to the Commissoner of Indian Affairs, dated March 16, 1872 (see Indian Office Files, Dakota S-739, 1872), indicates that as early as 1872 preparations were being made in Sioux City, and other frontier towns, to invade the Sioux Reservation in search of gold in the Black Hills:

> "I desire respectfully to call your attention to the preparations making in Sioux City and the frontier towns of Dakota to invade the Sioux Indian reservation, in the search for gold in the Black Hills. No gold has been found in the Black Hills, and the excitement has been started by Washburn the dismissed Agent, and his employees, principally by a man named Cox a discharged soldier. The frontier Editors know as well as anyone that the stories are enormous lies, but their business is to bring dupes to their particular towns, to get their money, and of course they keep up the noise.
>
> * * *
>
> "The Sioux will make bitter and continued war upon parties invading the portion of their reserve these people propose to take possession of.
>
> "Four years ago the same movement was started upon this frontier, but upon that occasion the parties dispersed upon notice from General Terry, that their invasion of the Sioux Reservation would be resisted by force. If this invasion be now permitted, the entire policy of trying to tame, and civilize the Indians, or to secure the Indians any rights under the sun, may as well be given up."

The Honorable M.K. Armstrong, House of Representatives, in a letter to the Commissioner of Indian Affairs, dated March 17, 1872 (see Indian Office Files, Dakota, A-791, 1872; also Secretary's Files, Miscellaneous, 1872), likewise informed the Office of Indian Affairs of preparations being made at Yankton, Dakota Territory, to invade the Black Hills, and enclosed a copy of House Bill No. 1176, authorizing the Secretary of the Interior to enter into negotiations with the Sioux Nation of Indians for the purchase of the Black Hills pine lands on the headwaters of the Cheyenne River in Dakota Territory. The Commission of Indian Affairs forwarded said bill to the Secretary of the Interior with a letter dated March 26, 1872 (see Indian Office Report Book No. 21, page 351), which reads in part as follows:

> "I have the honor to be in receipt of a communication from the Hon. M.K. Armstrong, House of Representatives, under date of the 17th of March, informing the Department that large expeditions are being organized 'for the purpose of penetrating and exploring the mineral resources and pine forests of the Black Hills of Dakota, now embraced within the reservation set aside by the Treaty of 1868 for Confederated Bands of Sioux Indians;' and that large meetings have been recently held at Yankton 'presided over by Governor Burbank, in which speeches were made by many of the Federal officials, favoring the policy of petitioning the Government for authority to enter that country for the purpose of mining and lumbering.'
>
> "The Hon. Mr. Armstrong encloses a copy of House Bill No. 1176 authorizing the Secretary of the Interior to enter into negotiations for the purchase of the Black Hills pine lands on the head-waters of the Cheyenne River in Dakota Territory.
>
> "The communication of the Hon. Mr. Armstrong is referred to this office 'for the views and suggestions of the Commissioner.'
>
> "Upon so much of the Hon. Mr. Armstrong's letter as relates to the organization of expeditions, and the holding of public meetings, I have to observe that the intrigues of the Federal Officials of Dakota, in reference to the Black Hills, have for some time been known to this office, and that they are, in view of the solemn obligations of the Government, most dishonorable, and in view of the character of these Indians, most dangerous to the peace of the country. If these gentlemen think they can trifle in this way with the Sioux of Red Cloud and Spotted Tail, they are greatly mistaken, and will find themselves painfully undeceived, if their expedition ever sets out for the Black Hills.
>
> "An expedition of the character indicated, directed toward the Black Hills, would, beyond the possibility of a question, instantly precipitate a general Indian war, in which the thirty thousand Sioux would join as one man.

"Upon the specific matter of House Bill No. 1176, I desire merely to say that the negotiations proposed can do no good and may do much harm. The Indians will not sell this country, nor give their consent to opening it up for purposes of mining and lumbering. They are already greatly alarmed and excited over the rumors of such a purpose on the part of the citizens of Dakota, and were they to be approached by Commissioners on the part of the United States with such a proposition, they would regard it as a sufficient confirmation of their jealousy and suspicion."

The Secretary of the Interior, in a letter dated March 30, 1872 (see Indian Office Files, Secretary's Letter Book No. 19, page 258), requested the Governor of Dakota Territory to issue a proclamation admonishing all persons who contemplated invading the Black Hills country that such invasions would not only be illegal and likely to disturb the peace between the United States and the Sioux Indians, but would also be disapproved by the Government. Accordingly, Edwin S. McCook, Secretary and Acting Governor of Dakota Territory, on April 6, 1872, issued a proclamation (see Indian Office Files, Dakota, M-950, 1872), which reads in part as follows:

"Information having reached the office of the Executive of said Territory, through various sources, to the effect that combinations of men have been and are now being made with a view to entering and occupying the region of country known as the 'Black Hills' of Dakota, which is within the Reservation belonging to the Sioux Indians, under the plea that the said Black Hills country has valuable mineral deposits, as well as quantities of timber fit for lumber.

"Now, therefore, I, Edwin S. McCook, Secretary and Acting Governor of the Territory of Dakota, by the direction of the President of the United States, through the Hon. Columbus Delano, Secretary of the Interior, do hereby warn all such unlawful combinations of men, of whatever locality, or under whatever plea of excuse operating, that any such attempt to violate our Treaty stipulations with these Indians, or disturb the peace of the said Territory, by an effort to invade, occupy or settle upon said Reservations, will not only be illegal, and likely to disturb the peace between the United States and said Indians, but will be

disapproved by the Government. And if such efforts are persisted in, the Government will use so much of its civil and military as may be necessary to remove from this Indian Territory all persons who go there in violation of law.

"In testimony whereof, I have hereunto set my hand, and affixed the Seal of the said Territory."

Lieutenant General P.H. Sheridan, on page 40 of his "Record of Engagements with Hostile Indians within the Military Division of the Missouri from 1868 to 1882" (Library of Congress), made the following statement regarding Indian attacks upon the military posts in the Department of Dakota during the year 1873:

"So bold and frequent had been the Indian attacks upon the military posts and the escorts to working parties on the railroads, in the Department of Dakota, that an additional regiment of cavalry, the 7th, was transferred to that Department from the Military Division of the South, for the purpose of following and punishing these Indians if they continued their attacks. An expedition was organized under Colonel D.S. Stanley, 22nd Infantry, and a supply depot established near Glendive Creek where it empties into the Yellowstone, the point at which it was expected the surveying parties of the Northern Pacific Railroad would run their line across the River. The troops comprising the 'Yellowstone Expedition' left Forts Rice and Abraham Lincoln, about the middle of June, returning to their stations in September after accomplishing the purposes intended, having had several engagements with the hostiles during this period."

The Secretary of the Interior, in a letter to the Commissioner of Indian Affairs, dated March 5, 1873 (see Indian Office Files, Secretary's Letter Book No. 21, page 458), made the following statement regarding the violation of certain provisions of the Sioux Treaty of April 29, 1868:

"I have the honor to call your attention to the 16th Article of the treaty of April 29th, 1868, with different tribes of Sioux Indians.

"By this Article you will observe that the country north of the North Platte River, and east of the summit of Big Horn Mountains, is to be regarded as Indian territory, in which no white persons are permitted to

settle without the consent of the Indians is first obtained, &c.

"Information has reached this office that this provision of the Treaty is being violated, and, also, that it is being done with the consent of the General Land Office, or persons in the employ of that office.

"You are respectfully requested to furnish the Com'r of the General Land Office with a copy of this letter, and request him to examine the subject referred to, and furnish your Office as soon as possible with any information in his possession, or that he may be able to obtain touching the accuracy of the information herein referred to, in regard to the violation of the 16th Article of the treaty of April 29, 1868, with different tribes of Sioux Indians."

Correspondence ensued between the Commissioner of Indian Affairs and the Commission of the General Land Office with reference to the subject matter of the foregoing letter, and in a letter to the Commissioner of Indian Affairs, dated April 3, 1873 (see Indian Office Files, Secretary's Files, Miscellaneous), the Commissioner of the General Land Office made the following statement:

"I have received your letter of the 25th ultimo covering copy of a communication from the Hon. Secretary of the Interior bearing date the 15th same month addressed to your office upon the subject of alleged violation of treaty stipulation in the 16th Article of the treaty of April 29, 1868 with different tribes of Sioux Indians.

"In accordance with the Departmental directions and your request that I examine the subject matter and furnish your office with any information touching the violation of the aforesaid treaty stipulation, I have to say that, upon examination of the 16th Article referred to, I find that the United States agreed that the country lying north of the North Platte River and east of the summit of the Big Horn mountains should be held and considered as unceded Indian Territory, that no white person shall be permitted to settle or occupy any portion of the same nor shall pass through it without the consent of the Indians.

"As the reported infraction of the Article of the treaty, hereinbefore alluded to is ascribed to this office or persons in its employ I have caused an examination

of the records of this office with a view of eliciting the fact whether or not any infringement of the treaty has been made in the administration of this office, and have to report the following result of the inspection of the records, viz:—

"It appears that the extension of the lines of the public surveys in the State of Nebraska within the limits of the Union Pacific R.R. has crossed the North Fork of Platte river and some townships have been subdivided within the hunting grounds of the Sioux Indians, as shown per diagram accompanying this communication and colored in pink; also that some few standard lines and township lines have been surveyed as represented in black lines, together with contracted for; but unsurveyed township lines indicated in yellow lines.

"The foregoing surveys: plats amounting to some thirty in all have been filed in the Local Land Office and about fifty entries have been allowed on the lands; besides this there have been some school selections made within the surveyed lands and a number of declaratory statements have been filed by settlers.

"The foregoing seems to be the whole extent of the infraction of the 16th Article so far as this office is advised and is confined to the State of Nebraska only, which was admitted into the union on the 9th of February 1867 prior to the conclusion of the treaty with the Sioux.

"Should the claimed limits of the Indian Reservation be still maintained it will be necessary that this office be informed of the same so that the Surveyor General of Nebraska may be so informed and the surveys within the limits of the reserve discontinued."

The Commissioner of Indian Affairs, with a letter dated April 19, 1873 (see Indian Office Report Book No. 22, page 444), submitted the foregoing letter to the Secretary of the Interior, and recommended either that a special commission be appointed, or that one or more members of the Board of Indian Commissioners be requested to visit the Sioux Indians, to negotiate with them for the relinquishment of their claims to such portion of the unceded Indian country described in Article 16 of the Treaty of April 29, 1868, as was situated within the limits of the State of Nebraska. The Commissioner also suggested that it could be urged upon the Indians, as one of the inducements for them to make the

proposed relinquishment, that the last installment of their subsistance fund would expire on June 30, 1874, but that if they would consent to cede to the United States their claim to the country in question, the Government would continue to aid them in the way of furnishing supplies. He also recommended that in the meantime the General Land Office be directed to suspend further extension of public surveys in that region until a satisfactory understanding was established with the Sioux Indians. In another communication to the Secretary of the Interior, on the same date, the Commissioner of Indian Affairs further recommended that said commission be also authorized and instructed to select a proper site and to establish thereon an agency for the Red Cloud Sioux Indians. (See Indian Office Files, Secretary's Files Miscellaneous.)

M.K. Armstrong, Delegate in Congress from Dakota Territory, in a letter to the Commissioner of Indian Affairs, dated May 7, 1873 (see Indian Office Files, Dakota A-126, 1873), made the following statement with reference to empowering the aforesaid commission to negotiate with the Sioux Indians for their withdrawal from the Black Hills:

> "Noticing by the press that you contemplate sending out a commission to confer with the Indians (Sioux) in Southwestern Dakota with a view to curtailing the limits of their hunting grounds, I desire to respectfully urge upon your attention the importance of empowering the Commission to negotiate with said Indians for their withdrawal from the small area occupied by the main ranges of Black Hills in Dakota, which is a rough, timbered, mineral section, unfit for cultivation by friendly Indians, and serves only as a hiding place for hostile ones."

With reference to the foregoing recommendations, the Secretary of the Interior, in a letter to the Commissioner of Indian Affairs, dated May 14, 1873 (Indian Office Files, Dakota I-220, 1873), wrote in part as follows:

> "Referring to your letter of the 19th ultimo, in relation to the alleged violation of the 16th Article of the treaty concluded with various bands of Sioux Indians, April 29, 1868, * * * .
>
> "The progress of population westward has already rendered it desirable that the territory embraced in this article be no longer considered to be unceded Indian territory, and that it be surveyed according to our system of Government surveys, and made accessible to homestead and preemption settlement, as well as to sale to persons desiring to settle upon it. To continue much longer the exclusion of white people from the settlement of this country will necessarily occasion great complaint and provoke such feeling among the inhabitants of the State of Nebraska.
>
> "To prevent the difficulties here alluded to, and to remove complaints already made upon this subject, I have concluded to appoint Commissioners charged with the duty of treating the various bands of Sioux Indians, parties to the treaty of 1868, for a relinquishment of all the privleges reserved to said Indians by the 16th Article of the treaty aforesaid, and for the restoration of the territory therein embraced, without incumbrance, to the public domain.
>
> "My attention has also been invited to the 11th Article of the treaty before referred to, * * * .
>
> "In connection with this article I have to remark that white settlements, near to, if not within this territory and upon which there was reserved to the Indians the right to hunt so long as the buffalo may range thereon in such numbers as to justify the chase, in my opinion render it exceedingly hazardous to permit this privilege to be longer exercised. Large herds of cattle, owned by settlers upon our frontier, are now fed, if not upon, yet very near to, the territory here assigned to the Indians as hunting grounds. To permit this privilege of hunting on the part of the Indians, is to endanger the occurence of difficulties and outrages between the white settlers and those engaged in these hunting expeditions. I deem it, therefore, of very great importance to the peace of the country, to the security of the settlements of the frontier, and to the welfare of the Indians, that the latter should be induced to relinquish these hunting privileges. The Commission will, therefore, be charged with the duty of endeavoring to procure the agreement of the Indians to relinquish the privilege here referred to. It is probably important that the present Agency selected for Red Cloud and his band should be located elsewhere. The Commission will, therefore, be charged with the duty of inquiring whether such change should be made, and if so, where the new location should be made."

The report of the aforesaid commission is set out in the Annual Report of the Commissioner of Indian Affairs for 1874, pages 87 and 88, and the following excerpts are quoted therefrom:

> "The commission after such consultation determined not to press upon the Indians the relinquishment of their right to the unceded territory east of the summit of the Big Horn Mountains, partly because the action of Congress at its last session looked only to the cession of their rights in the territory south of their reserve, and partly because the temper of the Indians was such as to make it apparent that an effort to accomplish too much would end in accomplishing nothing.
>
> "Much effort was made, however, to secure the relinquishment of the right to roam over the unceded territory north of the North Platte and south of the northern line of Nebraska, and to hunt on the Republican Fork. The commission are glad to be able to report that the Indians connected with the Spotted Tail agency accept the consideration offered by the Government for the surrender of these rights, and agree to relinquish them, only asking that the right be not withdrawn until after this winter, 1874–'75. The commission recommend that $10,000 of the amount voted by Congress for the purchase of the above-mentioned treaty rights be appropriated to the Upper Brules; that, in accordance with their request, it be paid in American horses and light wagons; that the time of delivery be immediately after the return of their hunting parties from their winter hunt; that the distribution of the horses and wagons be left to the chief, and that, upon their delivery, formal notice be given to the Brules, that their right to roam and hunt south of the Niobrara has ceased, and that its use will be prevented by the military.
>
> "Equal success did not attend the efforts of the commission to obtain from the Ogallallas the relinquishment of their right to roam and hunt. The commission have felt much difficulty in coming to a decision as to the course which it is proper for the Government to pursue under these circumstances. All things considered, they are of opinion that these Indians have so many conflicting interests and jealousies that it is not probable that they can of themselves arrive at any unanimous decision in the premises; and that the Government should decide for them and its citizens must be relinquished; but that, as Red Cloud claims that promises made his people by other commissions and by Government officers are as yet unfulfilled, a sum of $15,000 addition to that appropriated last year should be appropriated, to be paid him and his people, in the same manner as the previous sum, in presents such as they shall choose, which two sums (or their value in goods) they shall be informed is a full and complete settlement of all claims which they have, or think they have, against the Government, and the payment of which terminates completely their right to hunt or roam south of the Niobrara River. As Spotted Tail makes the same claim as Red Cloud as to unfulfilled promises, an appropriation of $10,000 additional to that voted by Congress at its last session should be made in his behalf."

With reference to the foregoing report, the Commissioner of Indian Affairs, in his Annual Report for 1874, page 9, wrote in part as follows:

> "It will be seen by the report of the commissioners appointed to negotiate at Red Cloud and Spotted Tail agencies for the relinquishment of the privilege secured to the Sioux by the treaty of 1868 to hunt in Nebraska, and to find a suitable location for the Spotted Tail agency, that the purpose of the commission was not fully accomplished; but it is expected, as the result of their conference, that the Indians, in consideration of $25,000 offered in exchange, will yet consent to the relinquishment of the privilege of hunting south of the Niobrara, in Nebraska."

The Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated June 9, 1874 (see Indian Office Files, Secretary's Files, Miscellaneous), made the following statement regarding the stationing of troops in the vicinity of the Red Cloud and Spotted Tail agencies:

> "At the request of this Department troops have occupied the Indian country in the vicinity of Red Cloud and Spotted Tail Agencies. This occupation by the military has proved very serviceable in the interest of good order, the protection of government property and lives of Agents and government employe's. The effect also upon the Indians has been quite salutary.

"These two Agencies are subject to annual incursions from the northern hostile Sioux during the winter months, who not only rob the Agencies of supplies intended for the friendly Sioux, but also incite some of the evil disposed young men among the friendly bands to join them in deeds of mischief. Under this lead these bands are liable to plunder in Wyoming and Nebraska. There is no reason to doubt that the ensuing winter will bring the same peril of life and property from these Indians as last year and I believe it will be impossible to maintain these two Agencies without military protection."

The Secretary of War, in a letter to the Secretary of the Interior, dated June 22, 1874 (see Indian Office Files, Secretary's Files, Box 6A), made the following statement regarding a military expedition then about to start into the Black Hills country:

"This Expedition is understood to be merely a scout or reconnaissance, and no civilians are to be taken, and its purpose, is to seek information, in a peaceable manner, in regard to the character of the country entered. It is well known to the Department, that at various times the settlers in the adjacent country have contemplated Explorations to the Black Hills, and the Department has uniformly discountenanced such movements; but it has now almost become a military necessity that accurate knowledge should be possessed by the Army as to this portion of our territory, and for that purpose only is the present expedition undertaken.

"The military authorities do not share in the apprehension of Bishop Hare, that any grave result in the nature of an Indian outbreak, will result from this reconnaissance. The same apprehensions were entertained by many civilians in regard to the Yellowstone Expedition, of last year, but events proved that the fears aroused were groundless.

"In conclusion, I may say that the policy of this Department has been to make, and keep, peace with the Indians, and to that end it will always be glad to cooperate with the Department of the Interior."

Lieutenant General P.H. Sheridan, on pages 43 and 44 of his "Record of Engagements with Hostile Indians within the Military division of the Missouri from 1868 to 1882" (Library of Congress), made the following statement regarding military activities in the Department of Dakota during the year 1874:

"During the year 1874, the northern portion of the Division, the Department of Dakota, enjoyed comparative quiet. In that Department were located the majority of the hostile bands of Sioux, some of them on reservations along the Missouri River, some on Milk River farther north near the British boundary and others roaming over the valleys of the Big Horn, Yellowstone and Powder Rivers, occasionally coming into Red Cloud's or Spotted Tail's agencies to draw rations and other supplies.

"Occasionally they made a dash about Fort Abraham Lincoln to steal stock, or a raid into Montana, with attacks once in a while upon weak bands of friendly Indians, such as the Mandans and Rees. This condition of affairs was possibly owing to the limited extent of exposed frontier in the Department of the Platte, south of them, where the frontier settlements were much more progressed and exposed.

"In order to better control the Indians making these raids, for two or three years it was recommended to establish a large military post in the country known as the Black Hills, so that by holding an interior point in the heart of the Indian country the troops could threaten the villages and stock of the Indians if the latter raided the settlements. With the consent of the President, the Honorable Secretary of War, the General of the Army and the Honorable Secretary of the Interior, the latter having exclusive control of Indian Affairs, the Division Commander was authorized to make a military reconnaissance into the country about which only dreamy stories had hitherto been told. Fort Laramie, Wyoming, about one hundred miles from the Black Hills, was first selected as the point from which to fit out the expedition, but after two visits in person to that post, the Division Commander found the temper of the Indians in that vicinity such that an expedition from there would probably provoke hostilities so attention was turned to Fort Abraham Lincoln, at the end of the Northern Pacific Railroad, as the next most suitable point of departure, though the distance was much greater than from Fort Laramie. General Terry was directed to organize a strong expedition and

place it under the command of Lieutenant Colonel G.A. Custer, 7th Cavalry, who was regarded as especially fitted for such an undertaking. The reconnaissance was eminently successful, the country of the Black Hills was found to contain plenty of fine timber, considerable good soil and an abundance of water and grass. Gold was also discovered by the expedition, leading to a subsequent rush of miners and others who were with difficulty restrained from a general invasion of the Black Hills country. * * *"

The Commissioner of Indian Affairs in his Annual Report for 1874, pages 7 and 8, in referring to the aforesaid military expedition to the Black Hills country, wrote as follows:

"A military reconnoitering expedition to the country in Southwestern Dakota, known as the Black Hills, occasioned great excitement among the whole Sioux people during the summer. They regard it as a palpable infraction of their treaty stipulations, and were filled with the apprehension that it might lead to their exclusion from a country held sacredly their own, and highly prized as their home and last refuge from the encroachment of settlements. The exaggerated accounts of rich mines and agricultural lands given in the dispatches of the commander and explorers and correspondents of the expedition intensified the eagerness of the people all along the border to take possession of this country. Notwithstanding the subsequent correction, of these exaggerations by statements on reliable information that no indications of mineral wealth were found, and that the lands were undesirable for white settlements, together with the strict prohibition by the War Department of any intrusion into the Territory, exploring and mining expeditions have been fitted out at Yankton, Bismarck, and other points, and have started to the Black Hills. Some have been driven back by the Indians with loss of life and property, and others are supposed to be on their way. It is not believed, however, that any serious complication will arise from this source. If neither the military nor Indians should be able to guard their country, the explorers themselves will probably soon become satisfied of its undesirableness to them, and will voluntarily relinquish their projects for mining or settlement. It is not improbable, however, that legislation will be sought,

meanwhile, by which to procure the opening of this country to settlement. Such a course cannot be too strongly deprecated, and should be opposed in every form. Scarcely a greater evil could come to the Sioux people than the disturbance and demoralization incident to an attempt to dispossess them of their country."

William Ludlow, Captain, Corps of Engineers, accompanied the aforesaid Custer Expedition. Brevet Major General Custer and Captain Ludlow both reported on the expedition. Brevet Major General Custer's report embodied a description of the land within the Black Hills, topography, water and grazing facilities, location upon which a military cantonment could be built, and other facts pertaining to military reconnaissance, and is set out in full in Senate Executive Document No. 32, 43d Congress, 2d Session. Captain Ludlow's report was confined to a general account of the Black Hills country, including altitude, longitude and barometer readings, climate, etc., and is set out in full in House Executive Document No. 1, 44th Congress, 1st Session.

Brevet Major General Custer, in the aforesaid report, made the following statement regarding the existence of gold in the Black Hills:

"I referred in a former dispatch to the discovery of gold. Subsequent examinations at numerous points confirm and strenghten the fact of the existence of gold in the Black Hills. On some of the water-courses almost every panful of earth produced gold in small, yet paying, quantities. Our brief halts and rapid marching prevented anything but a very hasty examination of the country in this respect; but in one place, and the only one within my knowledge where so great a depth was reached, a hole was dug eight (8) feet in depth. The miners report that they found gold among the roots of the grass, and, from that point to the lowest point reached, gold was found in paying quantities. It has not required an expert to find gold in the Black Hills, as men without former experience in mining have discovered it at an expense of but little time or labor. * * *"

The following excerpts are quoted from the aforesaid report of Captain Ludlow:

"Some general account of the country to be explored will be useful in order to a full understanding of the objects of the expedition as set forth in this order.

* * *

"This immense tract, inclosing nearly forty-three thousand square miles, the greater portion of which, however, is bare and often arid prairie, destitute of every attraction for the settler, and only capable of supporting a scanty population of hunters, has for its choicest and most valuable portion the Black Hills, lying on its western border. All reports agreed as describing this as a mountainous, heavily-timbered tract, abounding in game, and containing within its unexplored interior an open, fertile, and well-watered region.

"In case, at any future time, complications with the Sioux or the advancing needs of bordering civilization should make it necessary to establish military posts upon this Indian reservation, indications all pointed to the Black HIlls as the suitable point, both on account of their geographical position and of the abundance of wood, water, and grass to be found there. To explain the value of its position it should be stated that the trails from the camp of the hostile Sioux on the Yellowstone to the agencies near the Missouri, where live the reservation Indians and whereon the issues of annuities are made, lead by a southeasterly course through the hills, the abundance of game and ample security of which make them a ready refuge in time of war and a noble hunting-ground in time of peace.

"It was therefore considered desirable to gain positive information regarding them, and to connect them as well by reconnaissance with the posts of Lincoln and Laramie. To accomplish these results was the object of the expedition.

* * *

"* * * There is much talk of gold, and industrious search for it is making. I saw in General Custer's tent what the miner said he has obtained during the day. Under a strong reading-glass it resembled small pin heads, and fine scales of irregular shape, perhaps thirty in number. The miners expressed themselves quite confident that if they could reach bed-rock in the

valleys at a favorable place, plenty could be obtained by use of the pan.

* * *

" * * * Even if under the authority of the Reservation Indians, occupation of the Black Hills should become possible, settlements there could only be protected by force and the presence of a considerable military power. Hostile incursions would not be unfrequent nor an occasional massacre unlikely, and these are conditions unfavorable to a rapid and permanent increase of population."

R.C. Drum, Assistant Adjutant General, Headquarters Military Division of the Missouri, in a telegram to Brigadier General A.H. Terry, Saint Paul, Minnesota, dated August 27, 1874 (see Senate Executive Document No. 2, Special Session, 43d Congress), made the following statement regarding threatened invasions of the Black Hills country:

"The Lieutenant-General commanding directs me to say that unofficial information has reached these headquarters of the organization of parties at Sioux City, Yankton, and Bismarck, to invade the Sioux Indian reservation, with the view of visiting the country known as the Black Hills.

"Should such information be correct, you will please notify such parties that they will not be permitted to go, unless under authority from the honorable Secretary of the Interior, or Congress."

Further instructions as to the course to be pursued in preventing invasion of the Black Hills were issued to Brigadier General Terry in a letter from Lieutenant General P.H. Sheridan, Commanding the Military Division of the Missouri, dated September 3, 1874 (see Senate Executive Document No. 3, Special Session, 43d Congress), as follows:

"Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian reservation, you are hereby directed to use the force at your command to burn the wagon-trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country. Should they succeed in reaching the interior, you are directed to send such force of cavalry in pursuit as will accomplish the purposes above named.

"Should Congress open up the country for settlement, by extinguishing the treaty rights of the Indians, the undersigned will give a cordial support to the settlement of the Black Hills.

"A duplicate of these instructions will be sent to General Ord, commanding Department of the Platte."

B.R. Cowne, Acting Secretary of the Interior, in a letter to J.L. Pennington, Governor of Dakota, dated September 8, 1874 (see Senate Executive Document No. 2, Special Session, 43d Congress), made the following statement regarding the invasion of the Black Hills country:

"I acknowledge the receipt of your letter of the 27th ultimo, referring to associations that are forming for the invasion of that part of the Territory embracing the Black Hills, notwithstanding existing treaties with the Sioux Indians, and requesting such suggestions for the guidance and benefit of citizens of the Territory as may be considered appropriate by the Department, and in reply would say: by the second article of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, (Statutes, vol. 15, p. 636) 'the United States agrees that the following district of country, * * * shall be, and the same is, set apart from the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in the discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, * * *.'

"The foregoing section prescribes who shall be allowed to enter this Territory so set apart for the Indians, and expressly states that none others shall be permitted to pass over, settle upon, or reside therein. The only power to alter this provision is that which made the treaty, and then it must be done with the consent of the Indians. What is known as the late

'exploring expedition' of General Custer was merely a military reconnaisance of the country for the purpose of ascertaining the best location, if in the future it should become necessary to establish there a military post.

"On the 22d of June last, in a letter to this Department, the honorable the Secretary of War wrote on this subject as follows:

" 'It is well known to the Department, that at various times the settlers in the adjacent country have contemplated explorations to the Black Hills, and the Department has uniformly discountenanced such movements; but it has now almost become a military necessity that accurate knowledge should be possessed by the Army as to this portion of our territory, and for that purpose only is the present expedition undertaken.'

"The question of opening up this country to settlement rests with Congress, and, until action has been taken by that body, this Department has no discretion in the matter, but is required and will endeavor to prevent any violation of the provisions of the treaty before mentioned.

"For the reasons herein set forth, all applications for permission to visit the Black Hills country will be denied."

Pinkney Lugenbeel, Lieutenant Colonel, First Infantry, Commanding, Southern District, Department of Dakota, on September 23, 1874, forwarded to the Acting Assistant Adjutant General, Southern District, Department of Dakota, a letter from J.D. DeRussy, Captain, First Infantry Commanding the Military Station, Lower Brule Agency, Dakota, dated September 16, 1874 (see Senate Executive Document No. 2, Special Session, 43d Congress), which letter, and Lieutenant Colonel Lugenbeel's endorsement thereon, read in part as follows:

"I have the honor to report that on the 9th instant I directed Lieutenant Dougherty, First Infantry, to proceed to Brule City with a detachment of six mounted men to acertain whether there were any parties organizing there for the purpose of invading the territory of the Sioux Indians in the direction of the Black Hills. On the 10th, Lieutenant Dougherty returned and reported that there were no men about the place except the permanent settlers, nor could he discover any indi-

cations of supplies or material necessary for use on an expedition.

"About two weeks ago a party of four or five, under a man named Somers, did actually cross the river with a view of pioneering a route to the Black Hills, but the party did not go farther than the Sand Hill region, some ten or twelve miles; the party have recrossed the river. Should another attempt be made, information of the fact will be given immediately, and can from this point be easily intercepted."

[Endorsement]

"Respectfully forwarded to headquarters Department of Dakota. The party referred to by Captain DeRussy proceeded farther than he thought; but I think, however, that this route is entirely closed to any unauthorized trip to the Black Hills country, as the Lower Brule Indians are watching it with great vigilance."

H.W. Bingham, Indian Agent, Cheyenne River Agency, Dakota Territory, in a letter to the Commissioner of Indian Affairs dated October 31, 1874 (see Indian Office Files, Cheyenne, B-1368, 1874), made the following statement regarding a party of 60 white men working the ground in the Black Hills:

> " I am advised by the Indians that there are about sixty white men in the Black Hills, on their reservation, working the ground. The Indians do not want to make war upon those white people, and request that white soldiers be sent out to drive the miners out of their country. Unless the Govt. take some measures to get these people out of the country, the Indians will certainly make war upon them, Please advise me of your views in this matter, that I may be able to keep the Indians quiet."

The Commissioner of Indian Affairs transmitted a copy of the foregoing letter to the Secretary of the Interior on November 20, 1874 (see Indian Office Files, Secretary's Files, Miscellaneous, 1874), who in turn forwarded it to the Secretary of War on November 23, 1874 (see Indian Office Files, Secretary's Letter Book No. 24, page 334), with the request that the proper military officers be instructed to remove any persons found trespassing on the lands of the Sioux Indians in the Black Hills, in order that trouble with the Indians might be avoided.

The Secretary of War, in a letter to the Secretary of the Interior, dated December 10, 1874 (see Senate Executive Document No. 2, Special Session 43d Congress), made the following statement regarding the aforesaid letter from Agent Bingham:

> "I have the honor to state that copies of your letter of the 23d ultimo, and of its inclosures, communications from the Commissioner of Indian Affairs, and Indian Agent Bingham, reporting the existence of miners on the Indian reservation in the Black Hills, were referred to the General of the Army, and by him to General Sheridan, indorsed to the effect that, even if these trespassers did exist in the district known as the Black Hills, he would not order troops there at this season of the year. General Sheridan, however, denies the statement made to Agent Bingham, and says the miners referred to are known to be in what is called the Black Hills of the Laramie, south of Laramie Peak, and are not in the Indian country, but at least two hundred miles south of the Black Hills of the Cheyenne, where Lieutenant-Colonel Custer made his reconnaissance last summer."

Agent Bingham, Cheyenne River Agency, in a letter dated December 5, 1874 (see Indian Office Files, Cheyenne B-1489, 1874), again informed the Commissioner of Indian Affairs of another party of white men being then on their way to the Black Hills, and stated that he proposed to start on the following day, with troops furnished him by the commanding officers at Fort Sully and the post at the Cheyenne River Agency, in pursuit of said white men and, if possible, to intercept them. On December 23, 1874, Agent Bingham telegraphed the Commissioner of Indian Affairs that said party had eluded his force and asked that additional troops be sent into the Black Hills to find and remove them. (See Indian Office Files Cheyenne B-1543, 1874.)

A copy of the aforesaid telegram was transmitted to the Secretary of War by the Secretary of the Interior, on December 23, 1874, with a letter of the same date (see Indian Office Files, Secretary's Letter Book No. 24, page 466), which reads in part as follows:

> "I have the honor to transmit, herewith, a copy of a report of this date from the Commissioner of Indian Affairs and accompanying copy of telegram and letter from Agent H.W. Bingham of Cheyenne River Agency

in relation to the intrusion of white men into the Black Hills country, and to his attempt, with the assistance of troops, to overtake and expel them.

"The country referred to is secured by treaty to the Sioux Indians, and I respectfully request that the most effective measures, within the power of the War Department may be adopted towards all persons making encroachments upon said territory and that all intruders be pursued, overtaken and expelled from it."

In accordance with the foregoing request, the War Department sent a company of soldiers under the command of Captain Guy V. Henry, Third Cavalry, into the Black Hills to expel the aforesaid party of miners. Captain Henry returned from the Black Hills country, reaching Camp Robinson on the evening of January 8, 1875, and reported that no trace of miners could be discovered. (See Senate Executive Document No. 2, Special Session, 43d Congress.)

The Department of the Interior received numerous requests during the years 1874 and 1875 from various individuals throughout the United States for information as to when the Black Hills would be opened to settlers, or whether white men could obtain title to lands in that country by purchase from the Indians themselves. The following excerpt, quoted from pages 534 and 535 of Indian Office Letter Book No. 122, is indicative of the language used by the Department in answering such requests:

"In reply to your letter dated the 9th inst. rec'd by reference from the Hon Secretary of the Interior, asking whether a white man could acquire an unquestionable title to lands by purchase or otherwise from Indians in the Black Hill Country, or other reservation, I have to advise you that the treaty of April 29th-1868, with the Sioux Indians provides that no white person or persons shall be permitted to settle upon or occupy, or without the consent of the Indians pass through any portion of the country north of the North Platte River, and east of the summits of the Big Horn Mountains, and this country includes the Black Hills.

"Indians occupying tribal relations cannot under existing laws make a title, or dispose of lands to private individuals."

E.D. Townsend, Adjutant General, in a telegram to General W.T. Sherman, Commanding, St. Louis, Mo., dated March 16, 1875 (see Senate Executive Document No. 2,

Special Session, 43d Congress), requested that the following information regarding expeditions to the Black Hills country be made public:

"The President requests you to make public the following:

"All expeditions into that portion of the Indian Territory known as the Black Hills country must be prevented as long as the present treaty exists. Efforts are now being made to arrange for the extinguishment of the Indian title, and all proper means will be used to accomplish that end. If, however, the steps which are to be taken towards the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled."

C. Delano, Secretary of the Interior, in a letter to the President of the United States, dated March 17, 1875 (see Senate Executive Document No. 2, Special Session, 43d Congress), made the following report regarding emigration to the Black Hills country:

"On the 16th instant I had the honor to receive, by reference from the President, a reoslution [resolution] of the Senate dated the 15th instant, in the following words, viz:

" '*Resolved*, That the President be requested to communicate to the Senate, if not incompatible with public interests, any information in his possession in regard to the proposed emigration to the Black Hills country, in the Sioux Indian reservation; whether such emigration is with the consent of the Indian tribes holding said country under the treaty of February 24, 1869; and, if not, what measures will be taken in relation to the same.'

* * *

As to the proposed emigration to that portion of the Sioux reservation named in the resolution, this Department is in possession of no information except that derived from the public prints, which contain certain reports to the effect that one expedition has succeeded in reaching the Black Hills.

"The persons composing said expedition have gone upon the Sioux reservation in violation of the provisions of the treaty, and are in the country referred to

against the wishes and without the consent of the Indians.

"Statements published in the newspapers indicate a determination on the part of many persons throughout the country to explore the Black Hills in search of minerals.

* * *

"A military order has been issued to the General of the Army, by the honorable the Secretary of War, to prevent any future expedition into that portion of the Indian Territory known as the Black Hills country as long as the present treaty exists, and advising that efforts are being made to arrange for the extinguishment of the Indian title, and that all proper means will be used to accomplish that end; and that if the steps taken toward the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled.

"This Department has taken steps to bring to this city a delegation of the Sioux (parties to the treaty) for the purpose of negotiating for the extinguishment of their right to the reservation embracing the Black Hills country, with a view to opening up the same to settlement, and until such an arrangement has been effected it is the intention of this Department, with the cooperation of the War Department, to protect the rights of the Indians as guaranteed to them by the treaty of 1868, and to prevent any further infraction of those rights.

"It is also the intention of this Department to use every effort possible to extinguish the Indian title to the Black Hills country, and open the same to settlement and explorations for mineral wealth at the earliest day practicable."

Reference to the Annual Report of the Commissioner of Indian Affairs for 1875, page 181, discloses that on March 27, 1875, Professor Walter P. Jenney was directed to make a topographical and geological survey of the Black Hills. A preliminary report submitted by Professor Jenney is set out on pages 181 to 183 of said annual report, and confirms, to a certain degree, the statements of travelers and explorers and the reports of Brevet Major General Custer's military expedition in the year 1874 regarding the Black Hills, which statements and reports have been hereinbefore discussed. The Commissioner of Indian Affairs, on pages 8 and 9 of his Annual Report for 1875, made the following statement regarding Professor Jenney's report:

"In order to provide for the question of a fair equivalent for this country, by direction of the President, a topographical and geological survey of the Black Hills was ordered, the preliminary report of which, by Walter P. Jenney, mining engineer in charge, will be found herewith. It furnishes many interesting and important facts respecting a region hitherto almost unknown. Professor Jenney and his assistants are entitled to a large credit for the conscientious diligence and thoroughness, which are apparent at every point in their work. The aid rendered by the War Department, by the courtesy of the General of the Army, and by Col. R.I. Dodge, commanding the escort, has been invaluable to the success of the survey. Without such aid, no satisfactory results could have been obtained, on account of the limited funds available for this purpose. The report confirms, in a large degree, the statements of travelers and explorers and the reports of General Custer's military expedition of last year, and shows a gold-field with an area of eight hundred square miles, and around this gold region, principally to the north, an additional area within the Black Hills country of three thousand square miles of arable lands, and this latter embracing along its streams an area equal to two hundred square miles finely adapted to agriculture, while the hill sides and elevations contiguous thereto are equally adapted to purposes of grazing, making the whole area of three thousand square miles of timber, grazing, and arable land of great value for agricultural purposes.

* * *

"These facts respecting the country which the Sioux seem about to be compelled to surrender, for the sake of promoting the mining and agricultural interests of white men, have an important bearing upon the question of compensation which shall be allowed for their lands; for it must be borne in mind that unless the Sioux Nation becomes extinct, of which there is no probability, the time is close upon them when they must have just such an opportunity for self-support as that which is now known to be offered in the Black

Hills; and if, for the want of another such country, they are obliged to begin civilization under increased disabilities, humanity as well as equity demands that such disability shall be compensated by increased aid from the Government; and to avoid the perils of future legislation, or want of legislation, the compensation should be provided for and fixed at the time when we are taking away their valuable lands.

* * *

"The true equivalent to be offered the Sioux, as helpless wards of the Government, for the Black Hills will be found by estimating what eight hundred square miles of gold fields are worth to us, and what three thousand square miles of timber, agricultural, and grazing lands are worth to them."

John L. Pennington, Governor of Dakota Territory, in a letter to the Secretary of the Interior, dated at Yankton, Dakota, June 8, 1875 (see Indian Office Files, Dakota P–315, 1875), made the following statement regarding the Black Hills question:

"The whole country is red hot on the Black Hills question, and I hope you will appoint the Commission to treat with the Indians and send them out at once. Small squads continue to leave Sioux City, Yankton, and other points to invade the reservations, and the volume will increase and the troubles multiply until a treaty is made and a way opened up for the restless thousands who desire to do so, to get into the Black Hills."

The Commissioner of Indian Affairs, in his Annual Report for 1875, pages 6 and 8, discussed the Black Hills question, as follows:

"The public excitement mentioned in my last report, occasioned by the discovery of gold in that portion of the Sioux reservation known as the Black Hills country, increased to such a degree in the opening of the spring season as to require action looking toward the purchase of this country from the Sioux proprietors and the opening up of the Big Horn Mountain country for settlement and mining. For this purpose, as well as for completing the negotiation for the relinquishment by the Sioux of their hunting rights in Nebraska and Kansas, a large delegation of this tribe, composed of

representatives from those agencies, was brought to Washington in May last for an interview with the President. It was not expected that this interview would conclude the purchase, but that it would prove a preliminary step by which the Sioux tribe would become acquainted with the wishes of the Government and its purposes relative to their own necessities and interests. Accordingly, at the request of the delegation, the President sent a commission, of which Hon. W.B. Allison, of the United States Senate, was made chairman, to negotiate at a general council of the tribe in their own country. The commission has not yet submitted its report, but I am informed that the negotiations have failed on account of a wide disagreement as to the value of the rights to be relinquished by the Sioux. Meanwhile, notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country. A mining association has been organized, laws and regulations have been adopted for mutual protection, and individual claims staked out, in the right to which they expect hereafter either to be protected by the Government or to protect themselves.

"In this serious complication there seems to be but one alternative for the Government; either to so increase the military force and adopt such summary means as will insure a strict observance of the treaty-rights of the Sioux by preventing all intrusion, or to renew the effort of negotiation. However unwilling we may be to confess it, the experience of the past summer proves either the inefficiency of the large military force under the command of such officers as Generals Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others.

"The occupation and possession of the Black Hills by white men seems now inevitable, but no reason exists for making this inevitability an occasion of wrong or lasting injury to the Sioux. If an Indian can be possessed of rights of country, either natural or acquired,

this country belongs for occupation to the Sioux; and if they were an independent, self-supporting people, able to claim that hereafter the United States Government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support; they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty-stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government, granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If, therefore, all attempts at negotiation have failed on the plan of going first to the Indians, I would respectfully recommend that legislation be now sought from Congress, offering a fair and full equivalent for the country lying between the North and South Forks of the Cheyenne River, in Dakota, a portion of which equivalent should be made to take the place of the free rations now granted."

The commission referred to in the foregoing quotation was known as the "Allison Commission." A complete report of said commission is set out on pages 184 to 200 of the Annual Report of the Commissioner of Indian Affairs for 1875, and reference thereto discloses that this commission failed to negotiate an agreement with the Sioux Indians for the relinquishment of the Black Hills country due to a wide disagreement as to the value of the territory to be relinquished, and for other reasons. The following excerpts are quoted from said report:

> "On the 18th day of June, 1875, the commission was appointed by the Secretary of the Interior, under the direction of the President, to proceed to the Indian country occupied by the Sioux Nation to hold with said nation a 'grand council,' with a view to secure to the citizens of the United States the right to mine in the country known as the 'Black Hills,' and such other rights as could be secured and as might be thought desirable for the Government, having in view the rights of the Indians and the obligations of the United States under existing treaty stipulations.
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> "On the 27th, 28th, and 29th, the commission listened to propositions from the leading chiefs of the various tribes, which were a mixture of complaints and demands, the latter of so extraordinary a character as to make it manifest that it was useless to continue the negotiations. ***
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> * * *
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> "At the meeting on the 28th, Spotted Tail asked the commissioners to state in writing what sum they were willing to pay for the hills, and the manner of payment. On the 29th the commissioners submitted a final proposition in writing to the Indians, as requested by them the day previous.
>
> "THE FINAL PROPOSITION.
>
> "The people of the United States, desiring to live in perpetual peace and unity with those of the Sioux Nation, and desiring to deal with them in all things liberally, fairly, and justly, and to contribute as far as may be to their civilization and comfort, do, through their commissioners, duly appointed and authorized, submit to said nation the following propositions, assuring them that it is their privilege to accept any one or reject all of them:
>
> "I. To purchase the license to mine, and also as incidental thereto the right to grow stock, and to cultivate the soil in the country known as the Black Hills, and bounded and described as follows, to wit: Beginning at the junction of the North and South Forks of the Cheyenne River, and embracing all the territory between said rivers lying west of said junction to the one hundred and fourth meridian of longitude west from Greenwich, the United States agreeing to pay therefor the sum of $400,000 per annum; the United States reserving the right to terminate said license at any time by giving two years' notice by proclamation, and payment of the full amount stipulated for the time the license may continue; and at the expiration of said term, all private property remaining upon said territory shall revert to the Sioux Nation; and such an

amount of said $400,000 as the Congress shall determine, not less than $100,000 annually, shall be expended for objects beneficial for their civilization, and the remainder of said annual sum shall in like manner be expended for their subsistence: or, if the Sioux Nation prefers it, [.]

"II. To purchase the Black Hills as above described, from the Sioux Nation, and to pay them for their interest therein the sum of $6,000,000 in fifteen equal annual installments; the said sums to be annually appropriated for their subsistence and civilization, not less than $100,000 of which shall be annually expended for purposes of civilization.

"III. That the President of the United States shall, under proper restrictions and regulations, designate three routes to the Black Hills country, as follows, to wit: One from the south, between the one hundred and second and one hundred and third meridians; one from the east, not farther north than latitude 43½°, until it reaches the one hundred and second meridian, and one from the west, not north of latitude 44°; also a branch road from some point on the Niobrara River to intersect either the eastern or southern route, at some convenient point not west of the one hundred and third meridian west of Greenwich.

"IV. The commissioners furthermore propose to purchase all that portion of what is known as the Big Horn country in Wyoming, which lies west of a line drawn as follows, to wit: Beginning at the northwest corner of the State of Nebraska, and running in a northwesterly direction until it reaches the Yellowstone River, where the one hundred and seventh meridian west of Greenwich crosses said river; and to pay the Indians for their interest therein the sum of $50,000 annually for ten years, to be paid in good American cows and other live stock, and in such implements of husbandry as are convenient to stock-growing and as may be deemed advisable by the President.

"V. Any agreement which may be made shall be of no binding force upon either party until it shall have been submitted and agreed to by Congress and approved by the President of the United States; and any agreement for the purchase of the Black Hills country shall be of no effect until it shall be so agreed to and approved, and until it shall be signed in accordance

with the provisions of the twelfth article of the treaty of 1868.

"VI. The commissioners propose that, in case of the acceptance by the Sioux Nation of the above propositions, and after the proposed agreement shall have been completed, as above set forth, a reasonable sum shall be expanded in presents to be distributed as is customary among the Indian people.

"The Indians refused to consider the question of cession of that portion of Wyoming known as the 'Big Horn country' on the ground that it was valuable to the wild tribes and bands who roam over it, and that they would not consent to surrender it at present. Finding the Indians opposed to any negotiation for the sale of the 'Big Horn country,' this branch of the subject was not pressed upon them, although it would be a very desirable acquisition.

"The proposition, so far as the Black Hills are concerned, was presented in the alternative. The commission then had serious doubts whether there was gold in the hills in sufficient quantity to make mining profitable, but were willing to make their proposition most liberal in order to give opportunity of testing their value. It will be observed that $500,000 of the annual payment was to be used for subsistence, in case of purchase, for fifteen years, and, in case of acquisition of mining right only, for a period of two years after notice to the Indians and to the miners, and $100,000 each year was to be used for purposes of civilization, to teach the Indians how to take care of themselves and to provide them with the means.

"The commission all agree that a much larger sum than $300,000 annually will be required for several years to subsist these Indians, regardless of what may be our future treatment of them. Under existing treaty-stipulations we are not required to make any appropriation for this purpose, yet Congress in the last two years has thus appropriated about $2,400,000. These appropriations have been made on the theory that either starvation or a border war would result if the appropriations were not made.

* * *

"Whatever our obligations may be under the treaty of 1868, it is the declared policy of Congress that they

shall be fulfilled, and the faith of the nation is pledged to their fulfillment. The second article of the treaty provides that a reservation described therein "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and the United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.*' So that, until this treaty is abrogated by the authority of the United States, it is the duty of the Government to see that this 'solemn promise' is enforced. When we remember that the exterior boundaries of the reservation cover an extent of over twelve hundred miles, we can realize the magnitude of this promise, especially when for nearly four hundred miles the eastern boundary is the Missouri River, and the south and west an open plain, so that roads are not necessary to enable persons to enter upon the reservation. The Black Hills are nearly in the center of the reservation from north to south, and easily accessible from all sides, except, perhaps, the north. The measure of force to be employed by the United States in enforcing this article of the treaty depends upon the good faith of the Sioux Nation with reference to their obligations. The obligations of the treaty are mutual and reciprocal. The Indians at the post have not so acted as to require the utmost vigilance on the part of the United States. They promised to maintain peace and order on the reservation. A failure to keep this promise would entail a heavy expenditure on the part of the Government, yet they have so conducted themselves, while receiving the bounty of the Government, as to make the establishment of expensive military post necessary at all the agencies. At Red Cloud there are four companies of infantry and two of cavalry; at Spotted Tail, three of infantry and one of cavalry; a post at Fort Laramie, contiguous to the reservation: and a small force at each of the other agencies; all made necessary by the conduct of the Indians, and all requiring great expense for their maintenance, except those on the Missouri River, on account of the distance from cheap

transportation. Now, they ask that the Government shall use this military force, not only to preserve order and protect property at the agencies, but also that it shall be used against citizens of the United States who choose to violate law and treaty-obligations, and who, in addition, take the risks of conflict with the Indians for the shadowy prospect of gold in the Black Hills!

"Although the treaty requires the Indians to be removed to a place designated on the Missouri River, or a place contiguous to it, a large portion of them (the larger part) have refused, and now refuse, to make their permanent home in the reservation set apart for them, and say they will only be removed by military force.

"Before the Sioux Nation is in position to exact so much of the Government, it should relieve the Government of the necessity of force to protect its own agents and property, purchased for the use of the Indians with money voluntarily appropriated from the public Treasury, and should comply with the provision that requires them to move to a designated place upon their reservation. They insist that the value of the Hills shall be estimated at many millions because of the gold easily acquired, but they refuse to become self-supporting by making effort to acquire it.

A petition from T.K. Bradley and several other miners, asking permission to return to their claims in the Black Hills, was submitted to the President of the United States on September 4, 1875. The matter was referred to the Secretary of the Interior, who requested the Commissioner of Indian Affairs to make a report on the advisability of granting their request. The Commissioner rendered an adverse report under date of September 13, 1875 (see Indian Office Files, Secretary's Files, Box 15C and Box 45), which reads in part as follows:

"In considering the request of the miners and the question whether their proposal can be carried out without violation of existing treaties, I respectfully invite your attention to the language of the treaty of April 29, 1868, proclaimed February 24, 1869 (Statutes at Large, Vol. 15-p. 635.)

"The second article of that treaty sets apart the reservation, the boundaries of which are therein described, ***'*for the absolute and undisturbed use and*

occupation of the Indians herein named and for such other friendly tribes or individual Indians as from time to time they may be willing with the consent of the United States, to admit amongst them; *and the United States now solemnly agrees that no persons except those herein designated and authorized so to do,* and except such officers, agents, and employees of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory, described in this article, or in such territory as may be added to this reservation for the use of said Indians,* and henceforth they will, and do hereby, relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and *except as hereinafter provided.*'

* * *

" 'Article 16. The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that *no white person or persons shall be permitted to settle upon or occupy any portion of the same,* or, without the consent of the Indians first had and obtained, to pass through the same; * * *.'

"It is therefore respectfully submitted that the proposal of the minors, herein referred to, cannot be carried out without violating existing treaties.

"The attention of the Honorable Secretary is also invited to the fact that negotiations are now pending with the Indians for the purchase of the Black Hills, and during these negotiations it is not deemed advisable that any privileges should be granted which are in contravention of treaty stipulations, as such action might give offense to the Indians and interfere with the negotiations with them."

Brigadier General George Crook, Commanding the Department of the Platte, in a report to the Assistant Adjutant General, Headquarters Military Division of the Missouri, Chicago, Ill., dated September 15, 1875 (see House Executive Document No. 1, Part 2, Volume 1, 44th Congress, 1st Session, page 69), made the following statement

regarding the efforts then being made by the military forces of the Department of the Platte to keep miners and prospectors from infringing upon the Indian reservation in which the Black Hills were located:

"The efforts which were being made by the military force of the department when I arrived, to keep miners and prospectors from infringing upon the Indian reservation in which the Black Hills region is located were only partially successful, though in some cases very stringent measures were reported to.

"I visited the mining region in July, and after seeing many of the miners in their camps, gave them sufficient time to secure their claims against further loss, in case they were eventually allowed to return. They agreed to vacate the country an agreement I have reason to believe they have generally observed."

Lieutenant General P.H. Sheridan, on page 54 of his "Record of Engagements with Hostile Indians within the Military Division of the Missouri from 1868 to 1882" (Libarary of Congress), made the following statement regarding military activities in the Department of Dakota during the year 1875:

"In the Department of Dakota, the military have had the double duty of protecting the settlements from the raids of hostile Indians, and the Black Hills country from occupation by miners, attracted there by real or imaginery mineral wealth in the soil. The troops of the Department of the Platte have been mostly engaged in the same manner as those of the Department of Dakota.

"I earnestly recommend some action which will settle this Black Hills question, and relieve us from an exceedingly disagreeable and embarrassing duty. I feel quite staisfied that all the country south of the Yellowstone River, from the Black Hills of the Cheyenne as far west as the Big Horn Valley, and perhaps as far west as Clark's Fork of the Yellowstone, is gold-bearing, but as to the amount of the gold deposit I cannot say; it may be great, or it may be small."

Further information regarding the military activities in the Department of Dakota during the year 1875, is set out in a report of Brigadier General Alfred H. Terry, Commanding the Department of Dakota, contained in House

Executive Document No. 1, Part 2, Volume 1, 44th Congress, 1st Session, pages 59 to 64, which reads in part as follows:

"* * * The principal object of the military movements which have taken place in the 'southern district' has been to guard that portion of the Sioux Indian reservation which is known as the Black Hills from the intrusion of those adventurers who, in defiance of law and the treaty obligations of the Government, have persistently attempted to invade that region in search of gold. Early in the spring of this year preparation was made to employ all the available force at the post on the Missouri River for this purpose, and especially all the cavalry in the department, except the companies of the Second Cavalry in Montana.

* * *

"* * * Many persons who had already entered the Indian reservation, and were attempting to reach the so-called gold-fields, were either turned back or arrested by these troops. Those who were arrested were conveyed to the Missouri River, at Randall, and there put off the reservation. In one or two instances it was discovered that persons captured had been previously arrested and put off the reservation. These persons, being subject to indictment under section 2148 of the Revised Statutes were taken to Yankton, and turned over to the civil authorities of the Territory of Dakota for trial.

"The garrison of Fort Sully has been employed in guarding the line of the Missouri for the same purpose. Since early June last small parties from that garrison have been constantly kept in motion along the bank of the river from Sully to the neighborhood of Old Fort Thompson, and I believe, have, except in a single instance, prevented parties from entering the reservations from that quarter. At two different times detachments were sent into the reservation from Sully to intercept parties of miners reported to be on their way to the Hills."

"Two detachments from the garrison at the Lower Brule agency and one from the garrison at the Cheyenne agency were sent out for the same purpose."

E.C. Watkins, United States Indian Inspector, in a letter to the Commissioner of Indian Affairs, dated November 9,

1875 (see Indian Office Files, Secretary's Files, Miscellaneous), made the following statement regarding the attitude and condition of certain wild and hostile bands of Sioux Indians in Dakota and Montana:

"I have the honor to address you, in relation to the attitude, and condition of certain wild, and hostile bands, of Sioux Indians, in Dakota, and Montana, that came under my observation, during my recent tour through their country, and what I think should be the policy of the Gov't toward them.

"I refer to 'Sitting Bulls' band, and other bands of the Sioux Nation, under chiefs, or 'head men', of less note, but no less untamable, and hostile. These Indians occupy the center,-so to speak,-and roam over Western Dakota, and Eastern Montana, including the rich valleys of the Yellowstone, and Powder Rivers. And make war on the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Payans, Crows, and other friendly Tribes on the circumfrance [circumference].

"Their country is, probably, the best hunting ground, in the United States, a 'Paradise' for Indians, affording game in such variety, and abundance, that the need of Gov't supplies is not felt. Perhaps, for this reason, they have never accepted aid, or been brought under control. They openly set at defiance all law, and authority, and boast that the United States, authorities are not strong enough to conquer them. The U.S. troops, are held in contempt, and, surrounded by their native moutains, relying, on their knowledge of the country, and powers of endurance, they laugh at the futile efforts that have thus far been made to subjugate them, and scorn the idea of white civilization.

"They are lofty, and independent, in their attitude, and language to Gov't officials, as well as the whites, generally, and claim to be the Sovereign Rulers of the land. They say they own 'the wood,-the water, the ground, and the air,' and that white men live in, or pass through their country, but by their sufferance.

"They are rich in horses, and robes, and are thoroughly armed. Nearly every warrior carries a breech loading gun, a pistol, a bow, and quiver of arrows. From their central position, they strike to the East, North, and West, steal horses, and plunder from all the surrounding Tribes, as well as Frontier settlers, and luckless white hunters, or emigrants, who are not in

sufficient force, to resist them. And fortunate indeed, is the man who thus meets them, if, after losing all his worldly possessions, he escapes with his scalp.

"And yet, these Indians number, all told, but a few hundred warriors, and these are never all together, or under the control of one chief.

"In my judgment, one thousand men under the command of an experienced officer, sent into their country, in the winter, when the Indians are nearly always in camp, and at which season of the year, they are the most helpless, would be amply sufficient, for their capture, or punishment.

"The Gov't has done everything, that can be done, peacefully, to get control of these Indians, or induce them to respect its authority. Every effort has been made, but all to no purpose. They are still as wild, and untamable, as uncivilized and savage, as when Lewis and Clark first passed through their country.

"The injureous [injurious] effects of the repeated attacks, made by these bands, on the peaceful, friendly Tribes, heretofore mentioned, cannot be overestimated. No people can reasonably be expected, to make progress in the arts of peace, if they must be constantly armed, and prepared to defend their homes, and property. No Indians can be expected to 'civilize,'-to learn to cultivate the soil, or the Mechanic Arts, if,-while they have the implement of labor in one hand, they must carry the gun in the other, for self defense. Their natural instincts come to the surface, at once. And the Indian Agent or Missionary who is zealously laboring for the advancement of the people under his care, and to carry out the humane policy of our Gov't,-the *only* policy, worthy, an enlightened, Christian Nation,-find his labors vastly increased, and discouragements, multiplied, by this state of affairs.

"These wild bands, are, but as a drop in the bucket in number, compared to the great body of Indians, who have accepted the peaceful policy, made Treaties with the Government and are helping them, or have been supplied with provisions, goods, and farming implements, without Treaty stipulations,-are under the care of Agents, friendly-and making fair progress in the way of civilization.

"In interviews with the Indians along the Missouri river, and through Montana, during my recent tour of

inspection, they invariably spoke of this subject, and complained, bitterly, that the Gov't was not protecting them, as it had promised, and frequently closed the case, by saying 'they might just as well go out, and kill white men, as to try to be good Indians, for they got no protection, or extra reward, for being good.' When I told them these Sioux would be punished, they said, 'We have heard that before, well wait and see.' While I am not disposed to the needlessly alarmed, and do not agree with the writers, of articles published in numerous Territorial papers, of a sensational character, on this subject, yet I think there is danger, of some of the young warriors, from friendly Tribes, falling off, and joining with these hostile bands, until, with these accessions they would be somewhat formidable, and might make a simultaneous attack, on the white settlers, in some localities, if they are thus allowed to gather head.

"The true policy, in my judgment, is to send troops against them in the winter, the sooner the better, and *whip* them into subjection. They richly merit the punishment, for their incessant warfare on friendly Tribes,-their continuous thieving, and their numerous murders of white settlers and their families, or white men where ever found, unarmed.

"The Gov't owes it, too, to these friendly Tribes, in fulfillment of Treaty stipulation. It owes it to the Agents, and employees, whom it has sent to labor among the Indians, at remote, and almost inaccessible places, beyond, the reach of aid, in time to save-It owes it, to the Frontier settlers, who have, with their families, braved the dangers, and hardships, incident to pioneer life, it owes it to civilization, and the common cause of humanity."

The Commissioner of Indian Affairs transmitted the foregoing letter to the Secretary of the Interior with a letter dated November 27, 1875 (see Indian Office Report Book No. 27, page 148), which reads in part as follows:

"I have the honor to transmit herewith enclosed, a special report from B.C. Watkins, United States Indian Inspector, dated the 9th instant, in relation to the status and condition of certain wild and lawless bands of Sioux Indians, giving an expression of his views in

reference to the future action of the government toward them.

"Inspector Watkins refers to Sitting Bulls band and others who roam over Western Dakota, and Eastern Montana including the rich valley of the Yellowstone and Powder Rivers, and make war on the Arickarees, Mandans, Gros Ventres, Assinaboine, Blackfeet, Piegans, Crows, and other friendly tribes, and he suggests for reasons stated by him that one thousand men under the command of a [an] experienced officer, be sent into the country of these hostile Indians (numbering but a few hundred) during the winter season, and compel them to submit to the authority of the Government."

"I respectfully recommend that this communication be referred to the War Department for consideration and such action as may be deemed best by Lieut. General Sheridan, who is personally conversant with the situation on the Upper Missouri and with the relations of Sitting Bull's band to the other Sioux tribes."

The Secretary of the Interior, under date of December 3, 1875 (see Indian Office Files, Dakota I–1569, 1875), sent the following reply to the Commissioner of Indian Affairs:

> "Referring to your communication of the 27th ultimo, relative to the status of certain Sioux Indians residing without the bounds of their reservation and their continued hostile attitude towards the whites, I have to request that you direct the Indian Agents at all the Sioux Agencies in Dakota and at Fort Peck, Montana, to notify said Indians that unless they shall remove within the bounds of their reservation, (and remain there,) before the 31st of January next, they shall be deemed hostile and treated accordingly by the military force.
>
> "Please instruct said Agents to acknowledge the receipt of your order and notify you of the execution of it."

Accordingly, under date of December 6, 1875 (see Indian Office Letter Book No. 128, page 132), the Commissioner of Indian Affairs transmitted the following order to the Indian Agents at Spotted Tail, Cheyenne River, Standing Rock, Red Cloud, Crow Creek, and Fort Totten agencies:

> "I am instructed by the Hon. Secretary of the Interior, under date of the 3rd instant to direct you to notify Sitting Bull's band, and other wild and lawless bands of Sioux Indians, residing without the bounds of their reservation, who roam over Western Dakota and Eastern Montana, including the rich valley of the Yellowstone and Powder rivers and make war on the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Piegans, Crows and other friendly tribes, that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile and treated accordingly by the military force."

The aforesaid Indians ignored the foregoing order, and the Secretary of the Interior, in a letter to the Secretary of War, dated February 1, 1876 (see Indian Office Files, Secretary's Letter Book No. 26, page 189), formally turned said Indians over to the Secretary of War for such action as he might deem proper under the circumstances. Said letter reads in part as follows:

> "On the 3d December last, I had the honor to address a communication to you relative to the hostile Sioux roaming in the Powder River Country, under the leadership of Sitting Bull, informing you that I had directed couriers to be sent from each of the Sioux Agencies, informing that Chief that he must come in with his followers to one of the Sioux Agencies before the 31st ultimo, prepared to remain in peace near the Agency, or he would be turned over to the War Department and the Army be directed to compel him to comply with the orders of this Department.
>
> "The time given him in which to return to an Agency having expired, and the advices received at the Indian Office being to the effect that Sitting Bull still refuses to comply with the directions of the Commissioner, the said Indians are hereby turned over to the War Department for such notion on the part of the Army as you may deem proper under the circumstances."

The Commissioner of Indian Affairs, under date of April 22, 1876, addressed a letter to the Secretary of the Interior, on the subject of Indian disturbances in the Sioux territory (see Indian Offices Report Book No. 28, page 57), which reads in part as follows:

"I have the honor to acknowledge the receipt by reference from the Department, of U.S. Senate Resolution of April 19, 1876, which directs the Secretary of the Interior 'to communicate' to the Senate any information in his possession in relation to the present situation of Indian disturbances in the Sioux reservation of unceded territory of said Sioux and whether military force has been interposed therein, and if so, whether at the instance of the Interior Department, and the reasons for such interposition.

"Assuming that the disturbances alluded to are those arising out of the course pursued for a long time past by lawless Indians under the leadership of the notorious Sioux Chief, Sitting Bull, in Western Dakota and Eastern Montana, I beg leave to say that this office has but meagre information in regard to the present situation of the troubles with these Indians.

"Herewith I transmit a copy of the correspondence on file here, showing the measures adopted by mutual understanding between the War and Interior Departments for inducing as well as compelling if need be, Sitting Bull and his followers to go upon their reservation in Dakota and remain there. It will be seen that insolent and destructive attitude of these Indians, rendered the use of military force a necessity. For the maintenance of good order and the protection of the whites an order had been issued by this Department in December 1875, that these troublesome and defiant Indians should go upon their reservation by the 31st of January last, or they would be regarded as hostile as [and] so treated by the military. As this order which had been communicated to them by carriers from several of the Indian Agencies seemed to be utterly disregarded, this office taking into consideration the opinion of the General, and Lieut. General of the Army, that a movement against them would be entirely practicable; and inferring that the force at command would be sufficient to restrain the Sioux Indians now at the several agencies, from an outbreak as a decision in favor of the hostiles, on the 21st of January ultimo, in a report to the Department expressed the conviction that enough had been done to fully commit the Department to the policy of force should the hostile bands refuse further to comply with its order.

"Acting upon that report, the Department under date of February 1st ultimo, communicted with the Secretary of War, and turned over these Indians to his Department for appropriate action by the army; and on the 3rd of said month the Secretary of War, replied that the Adjutant General had directed the General of the Army to take immediate measures to compel the Indians to return to and remain upon their reservation."

The Commissioner of Indian Affairs, in a letter to the Secretary of the Interior, dated July 7, 1876 (see Indian Office Report Book No. 26, page 262; also, Indian Office, Secretary's Files, No. 50, 7-7-76), made the following statement regarding hostilities of the Sioux Indians:

"In compliance with your instructions for report and in answer to inquiries of the Senate Resolution as to 'whether the Indians made any hostile demonstrations prior to the invasion of their treaty reservation by the gold hunters' and as to 'whether the present military operations are conducted for the purpose of protecting said Indians in their rights under the treaty of 1868, or of punishing them for resisting the violation of that treaty.' I have the honor to say that the whole number of Sioux who belong upon the Sioux reservation in Dakotah whose limits are defined by the treaty of 1868 as not less than 41,000. Of these all but a small portion, supposed not to exceed 3,000 variously termed 'non-treaty' or 'hostile' or 'Northern' Sioux, are collected at seven agencies within the reservation, and, there being little or no game on the reserve are subsisted by the issue of Government rations.

"The 'hostile' Indians have for several years past been camped upon the Yellowstone River where game is abundant; have refused to acknowledge the supremacy of the Government, and to go upon a reservation; have openly defied all law and authority; have held U.S. troops in contempt; have made disastrous raids upon nearly every peaceable and friendly tribe in Montana, Idaho, Wyoming and Dakotah; have engaged in a long series of depredations upon the white settlers of those territories resulting in the theft and destruction of much valuable property and the loss of many lives; and have used every means in their power to induce the reservation Indians to follow their example. These

'hostiles' are not a distinct band of Indians but a set of desperadoes consisting of the disaffected and outlaws from all the different bands of Sioux, who are held together by a common love of plunder and a determination to brook no restraint, and who acknowledge more or less as their leader, one Sitting Bull.

"Recognizing not only the irreparable damage to settlements caused by these Indians, but also their disastrous influence over the Shoshones, Arickarees and others whose efforts at civilization have been seriously retarded by their constant fear of attack from their enimies, and the demoralizing effect of their proximity in promoting a restless, uneasy feeling among the reservation Sioux and in affording an asylum for all lawless malcontents and criminals, the Department, after trying every other means without avail, and after consultation with the War Department, issued an order in December last that they should go upon their reservation by the 31st of January last or be turned over to the military. The utter disregard of this order has led to the present campaign upon the Yellowstone whose sole purpose is to subdue and compel these hitherto hostile Indians to respect the authority of the United States and to go upon the reservation assigned to them.

"The above facts are more fully set forth in Senate Ex. Doc. No. 52, of which I enclose copy, which contains a report prepared by this office on the subject on the 22nd of April last, together with various reports from inspectors and agents.

"In this connection I take pleasure in inviting your attention to enclosed extracts from reports of Inspector Vandever setting forth the fact that while short rations and the invasion of the Black Hills in violation of treaty stipulations, and the operations of the military against their friends and relatives in the hostile camp have caused considerable uneasiness among the Sioux at Red Cloud and Spotted Tail yet the main body of those Indians still remain at their agencies and the chiefs are making strenuous endeavors to keep their young men quiet and peaceable, with such success that in spite of all provocations the hostile camp has received comparatively few reinforcements and those mainly from the Northern Cheyennes and Arapahoes. Similar reports as to the determination of the chiefs and leaders among

the Sioux to keep the peace are received from every other agency."

House of Representatives Executive Document No. 184, 44th Congress, 1st Session, contains a report of the Secretary of War, dated July 8, 1876, in answer to Senate Resolution of July 7, 1876, in relation to the military operations in the territory of the Sioux Tribe of Indians, which reads in part as follows:

"To enable you to answer the inclosed resolution of the Senate of July 7, I have the honor to submit the following brief statement of facts as exhibited by the records of this Department:

* * *

"The present military operations are not against the Sioux Nation at all, but against certain hostile parts of it which defy the Government, and are undertaken at the special request of that bureau of the Government charged with their supervision, and wholly to make the civilization of the remainder possible. No part of these operations is on or near the Sioux reservation. The accidental discovery of gold on the western border of the Sioux reservation, and the intrusion of our people thereon, have not caused this war, and have only complicated it by the uncertainty of numbers to be encountered. The young warriors love war and frequently escape their agents to go on the hunt of war path, their only idea of the object of life. The object of these military expeditions was in the interest of the peaceful parts of the Sioux Nation, supposed to embrace at least nine-tenths of the whole, and not one of these peaceful or treaty Indians has been molested by the military authorities.

* * *

"The task committed to the military authorities is one of unusual difficulty; has been anticipated for years, and must be met and accomplished. It can no longer be delayed, and everything will be done by the Department to insure success, which is necessary to give even an assurance of comparative safety to the important but scattered interests which have grown up in that remote and almost inaccessible portion of our national domain."

Lieutenant General P.H. Sheridan, Commanding, in his "Record of Engagements with Hostile Indians within the Military Division of the Missouri from 1868 to 1882," pages 57 and 58 (Library of Congress), gives the following account of measures adopted in the year 1876 against the roving bands of hostile Sioux Indians:

> "In November, 1875, Indian Inspector, E.C. Watkins, reported to the Commissioner of Indian Affairs, the attitude of certain wild and hostile bands of Indians, under the leadership of various chiefs or headmen, who were roaming about Dakota and Montana.
>
> "Some of these bands had never accepted the reservation system, would not recognize the authority of the Government, and insisted upon remaining wild and perfectly free from control. Of this class was Sitting Bull, who was not a chief, but a 'head-man,' and whose immediate following did not exceed thirty or forty lodges.
>
> "Among the Indians referred to, were some who had not only attacked settlers and emigrants, but who had also been in the habit of making war upon the Mandans, Arickarees, and other tribes who were friendly to the whites. Inspector Watkins recommended, therefore, that troops be sent into the country inhabited by these wild and roving bands, to punish and reduce them to subjection. His report, with the views of the Commissioner of Indian Affairs, together with the recommendation of the Honorable Secretary of the Interior that the Indians be informed they must remove to reservations before January 31st, 1876, or in event of their failure to do, by that date, that they would be turned over to the War Department, were all referred by the General of the Army to Lieutenant General Sheridan, December 13th, 1875.
>
> "Another chief or head-man, against whom military operations were contemplated, was Crazy Horse, an Ogallale Sioux, properly belonging to Red Cloud Agency, whose band comprised perhaps a hundred and twenty lodges, numbering about two hundred warriors.
>
> "As Generals Terry and Crook commanded the Departments in which these Indians were located, the subject was submitted to them.
>
> "General Terry's opinion was that Sitting Bull's band was encamped near the mouth of the Little Missouri,

> that it could be reached by a quick movement which might be decisive at that season of the year, and that he had sufficient troops to make such a movement. General Crook was of the opinion that operations against the hostiles could be undertaken in his department whenever, in this opinion of the Indian Bureau, such action became necessary.
>
> "On February 7th, by endorsement of the General of the Army upon a letter of the Honorable Secretary of the Interior, authority was received to commence operations against the hostiles."

Immediately following the foregoing statement, Lieutenant General Sheridan gave a complete account of the military operations against the hostile Sioux Indians, and reference thereto discloses that troops began to move against said Indians early in 1876. These engagements continued throughout 1876 and 1877, various bands, or parts of bands, surrendering from time to time, until practically all of them had surrendered.

In a letter to the Commissioner of Indian Affairs, dated at Pine Ridge Agency, South Dakota, March 25, 1911 (see Indian Office Files, 96020/10, Standing Rock-174), John R. Brennan, Superintendent, made the following statements regarding the opposition of the Government to miners entering the Black Hills and the military operations against the Sioux Indians:

> "The contention that the Government withdrew opposition to miners entering the Hills after the Commission and Indians failed to agree on a treaty during negotiations in 1875 is not true. I happened to be one of a few who went into the Hills in 1875, remained there and have a very vivid recollection of the action taken by the Government to remove us. All through the fall and early winter of 1875-76 troops from Fort Laramie and Fort Lincoln were sent to the Hills several times to remove all trespassers. By December of 1875 the troops had rounded up and taken out every person in the Hills except about fifty of us who had succeeded in evading the troops. This activity on the part of the Government was kept up until after the treaty was made in September 1876 and, as stated in the Journal articles, the Government blockaded all roads leading to the Hills during July and August 1876 and tried to starve out those of us who were there and to keep others from coming in.

"Neither was the war ending in the Custer massacre brought on by the invasion of the Black Hills by whites. The records will show that the army had been engaged for two or three years previous to the Custer fight in fighting and subduing hostile Sioux in Wyoming, Montana and North Dakota."

In paragraph six of plaintiffs' contention, as set out on page 816, they allege that the United States created, established and maintained post office and post roads, permitted cities, towns and camps to be constructed, occupied and maintained by its citizens, and by its various officers, all on plaintiffs' lands. A careful search of the records, of the General Accounting Office and the Office of Indian Affairs fails to disclose any evidence of such action on the part of the United States, or its citizens or officers, prior to the date of the agreement coding the Black Hills, i.e., September 26, 1876 (19 Stat. 254), with the exception of some few camps established by certain miners and prospectors, which camps the military forces either broke up or made an effort to break up, as discussed on the preceding pages 846 to 879.

In paragraph 10 of plaintiffs' contention, as set out on page 818, plaintiffs alleges that the United States, by its armed forces, compelled plaintiffs to assemble along the western bank of the Missouri River in Dakota Territory in 1875 and 1876, and did there and then knowingly and wrongfully and in violation of plaintiffs' rights take from them their horses, guns and ammunition and rations, thereby depriving them of their regular mode of securing food and sustaining life.

Complete details of the seizure by the military forces of the United States of plaintiffs' horses, guns, ammunition, etc., is set out on pages 1207 to 1257, in answer to Contention No. 17 of plaintiffs pertaining to the same subject matter.

The plaintiffs, in paragraph 11 of their contention, as set out on page 818, allege that the United States did, in the years 1875 to 1876, in violation of the Treaty of April 29, 1868, knowingly and wrongfully deprive and withhold from them all rations or whatever kind or description and did then and there advise plaintiffs that until and unless they agreed to relinquish a certain area of land, that no rations, clothing or subsistence of any kind would be issued to them; that war between them and the United States would

follow; and that plaintiffs would be, in said war, exterminated.

It was stipulated in Article 10 of the Treaty of April 29, 1868, 15 Stat. 635, that each Indian over the age of four years, and who removed to and settled permanently on the Sioux Reservation and complied with the stipulations of said treaty would be entitled to receive from the United States, for the period of four years after he should have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians, parties to said treaty, could not furnish their own subsistence at an earlier date.

Detailed information regarding disbursements made by the United States for the benefit of the Sioux Tribe of Indians pursuant to the foregoing stipulations is set out on pages 755 301, in answer to Contention No. 8 of plaintiffs.

Indian Inspector William Vandever, in a report to the Commissioner of Indian Affairs, dated August 18, 1876 (see Indian Office Files, Inspector's Files, Dakota V-68, 1876), made the following statement regarding subsistence of the Sioux Indians:

"* * * I held a council with the chiefs and headmen of the Red Cloud and Spotted Tail Agencies on the 30th day of June. My talk to the Indians and the propositions that I submitted are reported. The following was assented to by the Indians at that time as the basis of a new agreement between them and the government. That in consideration of government continuing to furnish supplies of food as heretofore for the next five years the Indians would relinquish all their right and claim to the Black Hills country and agree to diminished boundaries of their reservation."

George W. Manypenny, Chairman of the Commission appointed to treat with the Sioux Indians for the cession of the Black Hills, in his report, set out in Senate Executive Document No. 9, 44th Congress, 2d Session, page 44, made the following statement regarding rations promised under the Treaty of April 29, 1868:

"* * * By the treaty of 1868 you were only to receive rations for four years. It is now eight years since that treaty was made. The rations that have been delivered to you since the four years have expired have been a gratuity, a gift, but the Great Council at

Washington has decided that it will not issue any more rations as a gift, and now we come by authority of the President to propose to you certain conditions upon which you can receive rations and other benefits in the future. * * *"

The foregoing statement was made at the council held with the Indians at the Standing Rock Agency on October 10, 1876, and similar statements were made to the Indians at the councils held at the other Sioux agencies.

With further reference to the allegations set out in the aforesaid paragraphs 10 and 11 of plaintiffs' contention, attention is invited to the fact that in 1876 control of all the agencies on the Missouri River, Dakota Territory, was transferred to the Commanding Officers at the agencies, Lieutenant General P. H. Sheridan, Commanding, Headquarters, Department of Dakota, in a telegram to Brigadier General A. H. Terry, dated July 24, 1876 (see Indian Office Files, Dakota W-504, 1877), made the following statement regarding this action:

"The Indian Department has transferred absolute control of all the Agencies on the Missouri to the Commanding Officers at the Agencies, who will be directed to allow no Indian absent or his family to again return to the Agency, except by the unconditional surrender of his person, guns and ponies."

Under date of August 1, 1876, the Commissioner of Indian Affairs addressed a letter to each of the Indian agents at Cheyenne River, Yankton, Standing Rock, and Crow Creek agencies, relative to control of Indians by the military at said agencies (see Indian Office Letter Book No. 130, page 488), which reads in part as follows:

"On the 26th ultimo, the following despatch was sent to you: 'Allow Military to so far control your Indians, as to prevent any from joining hostiles, and the latter and their families from coming in except on unconditional surrender. Aid in arresting, disarming and dismounting such, Issue no rations to such, except as prisoners. Assure all peaceable Indians, full protection, and kind treatment.'

"In connection therewith, you are further instructed that the parties arrested, whether charged with, or suspected of, being hostile, or having engaged in hostilities, or in the commission of depredations, should not be condemned without examination;

and if any shall be found innocent, they must be enrolled with the other friendly and well disposed Indians at the Agency, but, if guilty, the Military will hold them as prisoners until their final disposition shall have been determined by the proper authority.

"No promise of condoning crime as an inducement to come in will be made by you, and your conferences with such Indians must proceed on the principle of unqualified submission, to the authority of the Government, and with the understanding that no longer will their notions and wishes be consulted or favored at the expense of peace and good order, and the best interests both of the Indians and the whites.

"It is expected that you will heartily cooperate with the Military in the discharge of the duty that has been imposed upon them in this regard; and that by mutual good understanding, there will be harmony of action, and the attainment of satisfactory results."

General Orders No. 1, Headquarters Military Division of the Missouri, Chicago, Illinois, dated March 15, 1877, issued by R. C. Drum, Assistant Adjutant General, by command of Lieutenant General Sheridan (see Indian Office Files, Dakota W-504, 1877), reads in part as follows:

"Commanding officers at all Sioux Indian agencies, except those of Spotted Tail and Red Cloud, will allow the civil agents thereat to exercise entire control of the distribution of all goods and supplies to the Indians *present* at their respective agencies. It must, however, be understood that no supplies of rations or goods shall be issued to any Indians, or their families, who have been engaged in hostilities against the government, until they shall have been arrested and dismounted.

"The civil agents will be instructed by the proper executive department of the government to assist the military authorities, as far as lies in their power, in the discovery, arrest and dismounting of Indians, who after being engaged in hostilities, have returned to agencies, and in preventing Indians at the agencies from joining or giving relief or information to the hostiles.

"The above regulation will take effect at the Spotted Tail and Red Cloud agencies as soon as civil agents shall have been appointed thereto."

In paragraph eight of plaintiffs' contention, as set out on page 817, they allege that the United States did, by an act of Congress, on August 15, 1876, provide that thereafter no appropriations would be made for the subsistence of plaintiffs, unless they first agreed to relinquish all right and claim to certain territory described in said act, and unless they would do certain other acts therein named.

Plaintiffs further allege, in paragraph 12 of their contention, as set out on page 818, that the United States did, in 1876, present to them a proposition whereby they were to relinquish certain land, and by force, coercion, duress, and gross intimidation attempted to secure the ratification of plaintiffs to said instrument; but that plaintiffs did not ratify said instrument in accordance with the provisions of Article 12 of the aforesaid Treaty of April 29, 1868, which article reads as follows:

> "ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may he held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same: and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI. of this treaty."

In paragraph 13 of their contention, as set out on page 819, plaintiffs further allege that notwithstanding the aforesaid conditions, the act of February 28, 1877, was passed, and the United States remained in possession of the area described in said act, to the exclusion and against the right of plaintiffs.

The act referred to by plaintiffs in the aforesaid paragraph 12 of their contention, is the Indian appropriation act of August 15, 1876, 19 Stat. 192. That part of said act relating to appropriations for subsistence of plaintiffs reads in part as follows:

> "* * * and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of

> their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting: *Provided further*, That the Secretary of the Interior may use of the foregoing amounts the sum of twenty-five thousand dollars for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said band."

In accordance with the provisions of the foregoing act, the President of the United States, on August 24, 1876, appointed a commission to carry into effect the provisions thereof, (see Senate Executive Document No. 4, 44th Congress, 2d Session.) Immediately after their appointment, the commissioners appointed as aforesaid, visited the Sioux Indians, The first council was held with the Indians of the Red Cloud Agency early in September, 1876, when propositions in accordance with the conditions stated in the aforesaid act were presented to the Indians and finally accepted by them. Subsequently other Sioux agencies were visited, where councils were also held and the same proposition submitted to the Indians with a like result. The report submitted by said commission is printed in full in Senate Executive Document No. 9, 44th Congress, 2d Session, pages 6 and 7, together with full reports of the councils held with the Indians, also a copy of the agreement entered into, which was signed by the Chiefs and headmen of the various bands of Sioux Indians at the

several different agencies. Said report reads in part as follows:

"We submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular. We assured them that Congress and the President had given us full authority to devise a plan to save their people from death and lead them to civilization. The plan submitted by us was as follows:

"1. To provide ample rations for their subsistence until able to support themselves, such rations in all cases to be issued to the head of each separate family.

"2. That when said Indians shall be located upon land suitable for cultivation rations shall be issued only to those persons who labor, the sick, infirm, and aged excepted.

"3. That whenever the Government shall establish schools, as provided by the treaty of 1868, no rations shall be issued to children between the ages of six and fourteen years, the sick and infirm excepted, unless said children shall regularly attend school.

"4. That whenever any one of the Indians shall in good faith begin to cultivate the soil he shall have a title to his land and receive aid to build a house.

"5. That they shall be subject to the laws of the United States, and select as many headmen from each band to maintain order as the President may deem necessary.

"6. That all agents, traders, farmers, carpenters, blacksmiths, and other employes of the Government within their reservation shall be lawfully married and living with their families on the reservation.

"7. That no person of white or mixed blood, whose fitness morally or otherwise is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of the Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

"These provisions were carefully explained and interpreted, and were thoroughly understood by all the Indians. A copy of the agreement was given to them to take to their own council.

"The Indians were in council at their camp on Shadron Creek until the 14th, when we requested an answer. Chief Little Wound came to the agency and said, 'You are wise men and you have had time. Our councils may not seem of much importance to you, but to us it seems a very serious matter to give up our country. You must have patience and bear with us.' We held council with the Indians on the 19th and 20th of September, and after mutual explanations the agreement was duly signed.

"On the 21st, we proceeded to Spotted Tail agency to receive an answer to the same propositions, which had been submitted by two of our number on the 14th. After two days' council with the chiefs and headmen of Brule Sioux, who represented 4,607 Indians then at this agency, the agreement was duly signed.

"On the 2d of October, the commission, by the authority of the Commissioner of Indian Affairs, detailed Col. A. G. Boone and Dr. J. W. Daniels as a committee to take a delegation of the Red Cloud and Spotted Tail Indians to the Indian Territory.

"We arrived at Standing Rock agency on October 9, and submitted the propositions to the chiefs and headmen of the Upper and Lower Yanctonais, Uncpapas, and Blackfeet Sioux, who represented 2,344 Indians then present at this agency. The agreement, was signed on the evening of the 11th.

"We reached Cheyenne River agency on the 18th, and submitted the propositions to the chiefs and headman of the Sans Arcs. Two Kettles, Mimeconjoux, and Blackfeet Sioux, who represented 2,929 Indians then present at this agency. The agreement was signed on the evening of the 16th.

"We arrived at Crow Creek agency on the 20th, and met the chiefs and headmen of the Lower Yanctonais, who represented 1,213 Indians then present at this agency. The agreement was signed on the 21st.

"We reached Lower Brule agency on the 23d and met this chiefs and headmen of the Lower Brule. Who represented 1,002 Indians then present at this agency. The agreement was signed on the evening of the 24th.

"We reached Santee agency on the 26th, and met the chiefs and headmen of the Santee Sioux, who represented 855 Indians then present at this agency. The agreement was signed on the 27th.

"At all of these agencies the provisions of the agreement were made perfectly plain to the Indians,

having been fully explained to them. The Indians, on the Missouri River, with the exception of the Santees, objected to visiting the Indian Territory, and a supplementary clause was made exempting them from that part of the agreement."

John R. Brannan, Superintendent, Pine Ridge Agency, South Dakota, in a letter to the Commissioner of Indian Affairs, dated March 25, 1911 (see Indian Office Files, 96020/10, Standing Rock-174), made the following statement regarding the agreement entered into by the aforesaid commission:

> "This treaty [Agreement of September 26, 1876, ratified by the act of February 28, 1877] was made in good faith by the Indians and the Government and if there were any defects in it such defects were corrected in the 1889 treaty [act of March 2, 1889] when the Sioux ratified the Black Hills or 1876 Treaty and defined again the boundaries of the land ceded in the 1876 Treaty.

Section 19 of the act of March 2, 1889, 25 Stat. 896, referred to in the foregoing quotation, reads in part as follows:

> "SEC. 19. That all the provisions of the * * * agreement with the same [the different bands of the Sioux Nation of Indians] approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding."

The agreement made by the aforesaid commission, on the part of the United States, with the different bands of the Sioux Nation of Indians (Ogallala, Brule, Lower Yanktonai, Upper Yanktonai, Uncpapa, Blackfeet, Sans Arc, Two Kettles, Minnecoujou, Lower Brule, and Santee) at the Red Cloud, Spotted Tail, Standing Rock, Cheyenne River, Crow Creek, Lower Brule, and Santee agencies, and also the Northern Arapaho and Cheyenne Indians at the Red Cloud Agency, was submitted by the President of the United States to the Senate and House of Representatives on December 22, 1876. (See Senate Executive Document No. 9, 44th Congress, 2d Session.) Said agreement was ratified by Congress on February 28, 1877 (19 Stat. 255)

* * *

Exhibits in Appendix C To Reply Brief of Sioux Nation In Court of Claims No. 148-78

Lieut. General Philip H. Sheridan, Commander, Division of Missouri, to Brig. General A. H. Terry, Commander, Department of Dakota, November 9, 1875 (*Letterpress copy, Confidential*), Sheridan MSS., Library of Congress

Confidential

Nov. 9th, (187)5

My dear Gen. Terry,

At a meeting which occurred in Washington on the 3rd of November, at which were present, the President of the United States, the Secretary of the Interior, the Secretary of War and myself, the President decided that while the orders heretofore issued forbidding the occupation of the Black Hills country, by miners, should not be rescinded, still no further resistance by the military should be made to the miners going in; it being his belief that such resistance only increased their desire and complicated the troubles.

Will you therefore quietly cause the troops in your Department to assume such attitudes as will meet the views of the President in this respect.

Yours truly
(Signed) P.H. Sheridan
Lieut. General

Lieut. General Philip H. Sheridan, Commander, Division of Missouri, to General William T. Sherman, November 13, 1875 *(Letter Press Copy)* Sheridan MSS., Library of Congress

Chicago Nov 13-75

My dear Genl Sherman

After my return from the Pacific I was obliged to go East to see Mr. Chandler about the Black Hills and my report has thus been delayed.

Terry has been sick, but is now better and I am expecting his report daily.

The enclosed copy of Confidential letter to Terry will best explain the present status of the Black Hills.

The whole thing has gone along about as I had expected.

The Terry letter had best be kept confidential. I met a host of your friends on the Pacific and was so kindly treated myself as to make my visit a very dear remembrance.

Yours truly
(signed) PH Sheridan

General William T. Sherman, Commanding General of the Army, to Lieut, General Philip H. Sheridan, Commander, Division of Missouri, November 20, 1875, Sheridan MSS., Library of Congress

Headquarters Army of the United States

St. Louis. Mo. Nov-20 1875

Gen— P.H. Sheridan
Chicago, ILL.

P.H. Sheridan

Dear Genl—

Your letter of Nov-13 with enclosure was duly received, and would have been answered immediately. Only I know that the matter of the Black hills was settled at all events for this year. In the Spring it may result in Collision and trouble. But I think the Sioux Indians are all now so dependent on their rations, that they will have to do whatever they are required to do. My own idea of their Treaty is that settlements may now be made all along up the Western Boundary. And if some go over the Boundary into the Black Hills, I understand that the President and Interior Department will wink at it for the present.

* * *

Truly your Friend.
(Signed) W.T. Sherman

[43d Congress]
SPECIAL SESSION. } SENATE. { Ex. Doc. No. 2.

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

TRANSMITTING,

In answer to a Senate resolution of March 15, 1875, information in relation to the Black Hills country in the Sioux Indian reservation.

MARCH 17, 1875.—Read and ordered to lie on the table and be printed.

To the Senate of the United States:

I have the honor to transmit herewith communications from the Secretaries of War and the Interior in answer to the resolution of the Senate of the 15th instant, requesting "any information in my possession in regard to the proposed emigration to the Black Hills country, in the Sioux Indian reservation; whether such emigration is with the consent of the Indian tribes holding said country under the treaty of February 24, 1869; and, if not, what measures will be taken in relation to the same."

U.S. GRANT.

EXECUTIVE MANSION, *March 17, 1875.*

WAR DEPARTMENT,
Washington City, March 17, 1875.

SIR: I have the honor to inclose copies of correspondence from the files of the Department relating to the proposed emigration to the Black Hills country, and the measures taken by the military authorities in the matter, prepared in compliance with Senate resolution of the 15th instant.

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War.

THE PRESIDENT.

Copies of papers relating to proposed emigration to the Black Hills country, in the Sioux Indian reservation, and measures taken by the military authorities in the matter. Prepared in compliance with Senate resolution of March 15, 1875.

WAR DEPARTMENT, ADJUTANT-GENERAL'S OFFICE,
Washington, March 17, 1875.

Official.

E.D. TOWNSEND,
Adjutant-General.

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, Ill., August 27, 1874.

Brig. Gen. A.H. TERRY,
Saint Paul, Minn.:

The Lieutenant-General commanding directs me to say that unofficial information has reached these headquarters of the organization of parties at Sioux City, Yankton, and Bismarck, to invade the Sioux Indian reservation, with the view of visiting the country known as the Black Hills.

Should such information be correct, you will please notify such parties that they will not be permitted to go, unless under authority from the honorable Secretary of the Interior, or Congress.

R.C. DRUM,
Assistant Adjutant General.

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, Ill., September 3, 1874.

Brig. Gen. ALFRED H. TERRY,
Saint Paul, Minn.:

Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian reservation, you are hereby directed to use the force at your command to burn the wagon-trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country. Should they suceed in reaching the interior, you are directed to send such force of cavalry in pursuit as will accomplish the purposes above named.

Should Congress open up the country for settlement, by extinguishing the treaty rights of the Indians, the undersigned will give a cordial support to the settlement of the Black Hills.

A duplicate of these instructions will be sent to General Ord, commanding Department of the Platte.

P.H. SHERIDAN,
Lieutenant-General.

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, Ill., September 4, 1874.

Brig. Gen. A. H. TERRY,
Saint Paul, Minn.:

I will be glad if you will publish my instructions, or any you may have given yourself. The gold-fever was running so high here that I found it necessary to publish my instructions in the morning papers.

P.H. SHERIDAN,
Lieutenant-General.

WAR DEPARTMENT,
Washington, September 15, 1874.

SIR: I have the honor, in the absence of the Secretary of War, to inclose for your information copy of the instructions given by General Sheridan to General Terry on the 3d instant, to prevent trespassing on the Sioux Indian reservation, (Black Hills county.)

Very respectfully, your obedient servant,

H.T. CROSBY,
Chief Clerk.

The HON. SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., September 16, 1874.

SIR: I have the honor to transmit herewith, for the information of the War Department, a copy of a communication addressed to Governor Pennington, of Dakota, upon the subject of granting permission to parties to prospect in the Black Hills country.

Very respectfully, your obedient servant,

B.R. COWEN,
Acting Secretary.

The Hon. SECRETARY OF WAR.

[Inclosure.]

DEPARTMENT OF THE INTERIOR,
Washington, September 8, 1874.

SIR: I acknowledge the receipt of your letter of the 27th ultimo, referring to associations that are forming for the invasion of that part of the Territory embracing the Black Hills, notwithstanding existing treaties with the Sioux Indians, and requesting such suggestions for the guidance and benefit of citizens of the Territory as may be considered appropriate by the Department, and in reply would say: by the second article of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, (Statutes, vol. 15, p. 636,) "the United States agrees that the following district of county, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same; thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river; thence west across said river and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich; thence north on said meridian to a point where the forty-sixth-parallel of north latitude intercepts the same; thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river, shall be, and the same is, set apart from the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the Government as may be authorized to enter upon Indian reservations in the discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the Territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories,

except such as is embraced within the limits aforesaid, and except as hereinafter provided."

The foregoing section prescribes who shall be allowed to enter this Territory so set apart for the Indians, and expressly states that none other shall be permitted to pass over, settle upon, or reside therein. The only power to alter this provision is that which made the treaty, and then it must be done with the consent of the Indians. What is known as the late "exploring expedition" of General Custer was merely a military reconnaissance of the country for the purpose of ascertaining the best location, if in the future it should become necessary to establish there a military post.

On the 22d of June last, in a letter to this Department, the honorable the Secretary of War wrote on this subject as follows:

"It is well known to the Department, that at various times the settlers in the adjacent county have contemplated explorations to the Black Hills, and the Department has uniformly discountenanced such movements; but it has now almost become a military necessity that accurate knowledge should be possessed by the Army as to this portion of our territory, and for that purpose only is the present expedition undertaken."

The question of opening up this country to settlement rests with Congress, and, until action has been taken by that body, this Department has no discretion in the matter, but is required and will endeavor to prevent any violation of the provisions of the treaty before mentioned.

For the reasons herein set forth, all applications for permission to visit the Black Hills country will be denied.

Very respectfully, your obedient servant,

B.R. COWEN,
Acting Secretary.

Gov. J.L. PENNINGTON,
Yankton, Dakota.

[Indorsement.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, September 21, 1874.

Respectfully referred to the General of the Army.
By order of the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

MILITARY STATION, LOWER BRULÉ AGENCY, DAK.,
September 16, 1874.

SIR: I have the honor to report that on the 9th instant I directed Lieutenant Dougherty, First Infantry, to proceed to Brulé City with a detachment of six mounted men to ascertain whether there were any parties organizing there for the purpose of invading the territory of the Sioux Indians in the direction of the Black Hills. On the 10th, Lieutenant Dougherty returned and reported that there were no men about the place except the permanent settlers, nor could he discover any indications of supplies or material necessary for use on an expedition.

About two weeks ago a party of four or five, under a man named Sommers, did actually cross the river with a view of pioneering a route to the Black Hills, but the party did not go farther than the Sand Hill region, some ten or twelve miles; the party have recrossed the river. Should another attempt be made, information of the fact will be given immediately, and can from this point be easily intercepted.

Very respectfully, your obedient servant,
J.D. DE RUSSY,
Captain First Infantry, Commanding.

The ACTING ASSISTANT ADJUTANT-GENERAL,
Southern District, Department of Dakota.

[Indorsement.]

HEADQUARTERS SOUTHERN DISTRICT,
DEPARTMENT OF DAKOTA,
Fort Randall, Dak., September 23, 1874.

Respectfully forwarded to headquarters Department of Dakota. The party referred to by Captain De Russy proceeded farther than he thought; but I think, however, that this route is entirely closed to any unauthorized trip to the Black Hills country, as the Lower Brulé Indians are watching it with great vigilance. The other route, leading along the Niobrara River, does not seem to have been attempted, and I think Lieutenant-General Sheridan's order has effectually checked inroads into the Sioux Indian reservation for the present. Parties of whites and half-breeds who reside at the Spotted-Tail agency, about sixty-five miles from Harney's Rock, report to me that for many years past they have been in the habit of visiting the Black Hills country for the purpose of hunting, and they have never yet been able to ascertain that any paying dirt or quartz, either gold or silver, exist in that country. Many of these men are practical miners. Some of them have visited the Harney Peak country since Lieutenant-Colonel Custer was there last month. These men also report that the Black Hills country is too cold for agricultural purposes, and only fitted for hunting and grazing. It is well wooded and the water is also good.

PINKNEY LUGENBEEL,
Lieut-Colonel First Infantry,
Commanding Southern District.

WAR DEPARTMENT,
Washington City, October 13, 1874.

SIR: I have the honor, in the absence of the Secretary of War, to transit for your information, copy of report of J.D. De Russy, commanding Lower Brulé agency, Dak., dated September 16, relative to investigation of rumored attempts to organize expedition to the Black Hills.

Very respectfully, your obedient servant,
H.T. CROSBY,
Chief Clerk.

The Hon. SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., November 23, 1974.

SIR: I have the honor to transmit herewith, for your information and consideration, a copy of a letter from the Commissioner of Indian Affairs, dated the 20th instant, and inclosure therein noted, letter of Agent Bingham, dated 31st ultimo, to the effect that about sixty white men, miners, are working on the reservation of the Indians, in the Black Hills, and, unless they are driven off by the Government, the Indians will make war upon them.

I have the honor to request that the War Department instruct the proper military officers to remove any persons who may be found thus trespassing, in order that trouble with the Indians may be avoided.

I have the honor to be your obedient servant,
C. DELANO,
Secretary.

The Hon. SECRETARY OF WAR.

[Inclosures.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D.C., November 20, 1874.

SIR: I have the honor to transmit, herewith inclosed, a copy of a letter dated the 31st ultimo, from H.H. Bingham, United States Indian agent at Cheyenne, Dak., stating that about sixty white men (miners) are working on the reservation of the Indians in the Black Hills, and unless they are driven off by the Government the Indians will make war upon them.

This statement of the agent is based on an Indian rumor, and is forwarded for your information, with the suggestion that, if deemed of sufficient importance, the same be forwarded for the information and action of the War Department.

Very respectfully, your obedient servant.

EDW. P. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

CHEYENNE RIVER INDIAN AGENCY, DAK.,
Cheyenne Agency, Dak., October 31, 1874.

SIR: I am advised by the Indians that there are about sixty white men in the Black Hills, on their reservation, working the ground.

The Indians do not want to make war upon those white people, and request that white soldiers be sent out to drive the miners out of their country. Unless the Government take some measures to get these people out of the country, the Indians will certainly make war upon them. Please advise me of your views in this matter, that I may be able to keep the Indians quiet.

Very respecfully, your obedient servant,

H.W. BINGHAM,
United States Indian Agent.

Hon. EDWARD P. SMITH,
Commissioner of Indian Affairs, Washington, D.C.

[First indorsement.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE.
Washington, November 28, 1874.

Official copy respectfully referred to the General of the Army for proper action.

Herewith is also copy of telegram on this subject from Lieutenant-General Sheridan.

By order of the Secretary of War:

E.D. TOWNSEND,
Adjutant-General.

[Inclosure.]

[Telegram dated Chicago, Ill., November 27, 1874.—Received 12.40 p. m., November 27.]

To Brig. Gen. E. D. TOWNSEND,
Washington, D.C.:

I wish to relieve the honorable Secretary of War from any apprehension coming from the false statement going the rounds of some of the eastern papers, reporting miners at work in the Black Hills. The article is a falsehood. There are no parties in the Black Hills. It is possible the report may have originated from the recent discovery of gold forty miles north of Laramie City, on the Union Pacific Railroad, where many miners have gone. This place is at least two hundred miles southwest of the Black Hills.

P.H. SHERIDAN,
Lieutenant-General.

[Second indorsement.]

HEADQUARTERS OF THE ARMY,
Saint Louis, November 20, 1874.

Respectfully sent to General Sheridan. I have no orders to make in the premises. Even if there be trespassers in the district known as the Black Hills, I would not order troops there at this season of the year.

W.T. SHERMAN,
General.

[Third indorsement.]

HEADQUARTERS MILITARY DIVISION, MISSOURI,
Chicago, December 2, 1874.

Respectfully returned to the Headquarters of the Army.

The statement made to Agent Bingham, that miners have gone on the Indian reservation, is not true.

It would be well to inform the Interior Department and the War Department that the miners referred to are known to be in what is called the Black Hills of the Laramie, south of Laramie Peak, and are not in the Indian country, but at least two hundred miles south of the Black Hills of the Cheyenne, where Lieutenant-Colonel Custer made his reconnaissance last summer.

The whole of that country is designated by the Indians as the Black Hills, and the agents are not unfrequently ignorant of the country in which they are living or over which they have supervision.

P.H. SHERIDAN,
Lieutenant-General Commanding.

WAR DEPARTMENT,
Washington City, December 10, 1874.

SIR: I have the honor to state that copies of your letter of the 23d ultimo, and of its inclosures, communications from the Commissioner of Indian Affairs, and Indian Agent Bigham, reporting the existence of miners on the Indian reservation in the Black Hills, were referred to the General of the Army, and by him to General Sheridan, indorsed to the effect that, even if these trespassers did exist in the district known as the Black Hills, he would not order troops there at this season of the year. General Sheridan, however, denies the statement made to Agent Bingham, and says the miners referred to are known to be in what is called the Black Hills of the Laramie, south of Laramie Peak, and are not in the Indian country, but at least two hundred miles south of the Black Hills of the Chevenne, where Lieutenant Colonel Custer made his reconnaissance last summer.

The whole of that country is designated by the Indians as the "Black Hills," "and the agents are not unfrequently

ignorant of the country over which they have supervision."

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War.

The Hon. SECRETARY OF THE INTERIOR.

HEADQUARTERS POST ON NORTH LOUP, NEBR.,
November 24, 1874.

SIR: I have the honor to report my return to this post on Saturday, the 21st instant.

During the trip I saw nothing of the party mentioned in your telegram of the 31st ultimo. In my opinion, the lateness of the season will prevent any expedition from going to the Black Hills by way of the Niobrara River. No body of men had passed up at the time I left; and Wentworth is now of the opinion that the party reported by him had gone into camp to winter somewhere on the Niobrara River between Long Pine Creek and Yankton.

I will send a report of my trip by next mail.

Men and animals returned in good condition.

I am, sir, very respectfully, your obedient servant,

S. MUNSON,
Captain Ninth Infantry, Commanding.

The ASSISTANT ADJUTANT-GENERAL,
Department of the Platte, Omaha, Nebr.

WAR DEPARTMENT,
Washington City, December 10, 1874.

SIR: I have the honor to inclose, for your information, copy of letter of 28th ultimo, from the commanding officer, post on North Loup, relative to parties supposed to have gone to the Black Hills via the Niobrara River.

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War.

The Hon. SECRETARY OF THE INTERIOR.

[Telegram.]

HEADQUARTERS ARMY OF THE UNITED STATES,
Saint Louis, Mo., December 24, 1874.

General E. D. TOWNSEND,
Washington, D.C.:

General Sheridan telegraphs that a small party of twenty-one miners stole in from the Missouri River into the Black Hills. They were followed by Captain Tollman, First Infantry, with a small party, but were not overtaken.

General Ord will send a company from Spotted Tail's agency to overhaul them, under the provisions of telgraphic instructions of September 3 from division headquarters.

WM. D. WHIPPLE,
Assistant Adjutant General.

WAR DEPARTMENT,
Washington City, December 28, 1874.

SIR: I have the honor to transmit, for your information, copy of telegram from headquarters of the Army, dated the 24th instant, stating that a party of miners had invaded the Black Hills, and that General Sheridan had given instructions to overhaul them.

Very respectfully, your obedient servant,
WM. W. BELKNAP,
Secretary of War.

The Hon. SECRETARY OF THE INTERIOR.

Transcript of 5,505, *Adjutant General's Office*, 1874.

WASHINGTON, *December 23*, 1874.

The Interior Department submits copy of report from Commissioner of Indian Affairs, and copy of telegram and letter from Agent H.W. Bingham, of Cheyenne River agency, relative to intrusion of white men into the Black Hills country, and requests that measures be adopted by War Department toward all persons to effect their expulsion from said territory.

Referred to the General of the Army December 31, 1874.

CAMP SHERIDAN, NEBR.,
December 27, 1874.

SIR: have the honor to report my arrival at this post *en route* to the Black Hills, for the purpose of following the trail and expelling a party of miners. Shall leave my company in the morning with a guide, interpreter, and an Indian. The impression of the guide is that the party, after reaching Elk Creek, have followed Custer's trail to the north and west of hills. If the snow does not prevent can follow. The weather so far pleasant; the only difficulty is watering animals, holes having to be cut in the ice for that purpose. Have thirty day's rations, and will draw five days' more, the most I can carry.

I am, sir, very respectfully, your obedient servant,
GUY V. HENRY,
Captain Third Cavalry.

ASSISTANT ADJUTANT-GENERAL,
Department of the Platte, Omaha, Neb:

WAR DEPARTMENT
Washington City, January 19, 1875.

SIR: I have the honor to transmit, for your information, copy of report of the arrival at Camp Sheridan, Nebr., of Capt. Guy V. Henry, Third Cavalry, *en route* to the Black Hills, with the object to expel miners, & c.

Very respectfully, your obedient servant,
WM. W. BELKNAP,
Secretary of War.

The Hon. SECRETARY OF THE INTERIOR.

[Telegram, dated Saint Louis, Mo., January 12, 1875; received January 13.]

Gen. E. D. TOWNSEND,
Adjutant-General, Washington, D.C.:

Colonel Bradley telegraphs General Ord, this date, from Fort Laramie, that he has report there through a half-breed that Captain Henry has returned to Sheridan, himself and men badly frozen. No official information. Such reports are doubtful, but this may be true; it has been forty-five below zero within a week, and twenty-seven below this morning; too cold for men to be on the road.

WM. D. WHIPPLE,
Assistant Adjutant-General.

HEADQURTERS ARMY OF THE UNITED STATES,
Saint Louis, Mo., January 11, 1875.
ADJUTANT-GENERAL U.S.A.,
Washington, D.C.:

The following dispatch just received from General E.O.C. Ord:

Colonel Bradley telegraphs from Fort Laramie, January 8, all quiet at agencies. Twenty-seven degrees below zero. Lieutenant Winters telegraphs from Fort Laramie, January 10, that he has been driven in by severity of the weather, after getting as far as old Red Cloud's agency; that snow is drifted very badly, and thermometer ranging from twenty to forty below zero in the day-time. I think it probable that Captain Henry's company, now in pursuit of miners in the Black Hills, will suffer severely from the weather, and will lose a number of horses. I request that any directions given during the winter to move troops into the Black Hills may be made conditional on the state of the weather; such movements, up to April next, being extremely hazardous.

E.O.C. ORD,
Brigadier-General,
WM. D. WHIPPLE,
Assistant Adjutant General.

[Telegram dated Saint Louis, Mo., January 16, 1875.
Received at 2.10 p.m., January 16, 1875.]

General E. D. TOWNSEND,
Washington:

General Ord telegraphed yesterday that Captain Henry and three men, Company D, Third Cavalry, badly frosted, reached Camp Robinson on the evening of January 8; Lieutenant Carpenter and remainder of command, thirty cavalry and twelve infantry-men, reached there next day. The company experienced great suffering during whole trip, going and returning. Mercury at one time forty degrees below zero. No trace of miners could be discovered. Dispatch from commanding officer, Camp Robinson, covering this information by mail.

WM. D. WHIPPLE,
Assistant Adjutant-General.

WAR DEPARTMENT,
Washington City, January 19, 1875.

SIR: I have the honor to transmit, for your information, copy of telegram from Army headquarters, giving an account of the return to Camp Robinson of Captain Henry and his command, having discovered no trace of miners.

Very respectfully, your obedient servant,

WM. W. BELKNAP,
Secretary of War,

The Hon. SECRETARY OF THE INTERIOR.

[Telegram.]

HEADQUARTERS ARMY OF THE UNITED STATES,
Saint Louis, Mo., January 9, 1875.

General E. D. TOWNSEND,
Washington, D.C.

I herewith report the following dispatch, with General Sherman's request that it be laid before the Secretary of War:

OMAHA, NEBR., *January 9,* 1875.

Red Cloud and Spotted Tail have sent word to Colonel Bradley that they desire to visit Washington with some young and influential Ogallala and Brulé chiefs to negotiate sale of Black Hills country, if possible. Red Cloud states he sends to Bradley, as he thinks his agent unfriendly, and fears he cannot get hearing through him.

The chiefs state they don't want an escort to Washington, but prefer to go with two or three white men on whose friendship and aid they can rely. Bradley thinks Red Cloud and Spotted Tail are exerting their influence for best advantage of their tribes, and in interest of peace. I earnestly recommend that these and other principal chiefs be permitted to go to Washington. Unless something be done for them we shall be almost certain, between the gold-hunters and dissatisfied Indians, to have serious difficulties in the country in the coming spring.

E.O.C. ORD,
Brigadier-General.

WM. D. WHIPPLE,
Assistant Adjutant-General.

[Copy made and sent to the honorable Secretary of War, for Interior Department, January 11, 1875.]

DEPARTMENT OF THE INTERIOR,
Washington, D.C., January 28, 1875.

SIR: On the 12th instant I had the honor to receive a letter from the War Department, dated the 11th, inclosing copy of a telegram from General Ord recommending favorable consideration of the request of Red Cloud and Spotted Tail for permission to visit Washington.

I transmit herewith a copy of a letter, dated the 27th instant, from the Commissioner of Indian Affairs, to whom the subject was referred, who reports that there are no funds at the disposal of the Department that can be applied to the payment of the expenses incident to the visit of a delegation of the Sioux to this city.

It is the intention of this Department to make application to Congress at the present session for an appropriation to meet the expenses of such a delegation, the importance of which, in view of the present situation of Indian affairs in connection with the Sioux, is fully appreciated.

Very respectfully, your obedient servant,

C. DELANO,
Secretary.

The Hon. SECRETARY OF WAR.

[Inclosure.]

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D.C., January 27, 1875.

SIR: I have the honor to acknowledge the receipt, by reference from you, of a communication from the honorable Secretary of War dated January 11, 1875, inclosing copy of a telgram from General Ord, repeated from headquarters of the Army, recommending the favorable consideration of the request of Red Cloud and Spotted Tail for permission to visit Washington.

In reply I would respectfully report that this Office fully appreciates the importance of having Red Cloud and Spotted Tail, with some young and influential Ogallala and Brulé chiefs, visit this city with a view to procure on the part of the Sioux a better understanding of the wishes of the Government respecting them, and if possible an appreciation of the important changes in their tribal condition which are inevitable at no very distant date; but there are no funds at the disposal of this Office which can be

used to defray the expenses of such a visit, and, therefore, their request will have to be denied.

Very respectfully, your obedient servant,

EDW. P. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

[Copy furnished commanding general Department of the Platte, through headquarters of the Army, February 4, 1875.]

HEADQUARTERS OF THE PLATTE,
Omaha, Nebr., January 13, 1875.

SIR: Previous to the removal of the Pawnees from the reserve near the mouth of Loup Fork, Nebraska, the Sioux from Red Cloud and Spotted Tail were in the habit of making frequent raids upon the Pawnees, and the Pawnees were in the habit of pursuing or retaliating, so that the North Loup and Calamus Rivers had become a sort of war-path, both parties occasionally plundering or killing white settlers, and thus making the post of Fort Hartsuff on the North Loup necessary for the protection of settlements on the several Loup and Calamus Rivers; but the Pawnees having moved into the Indian Territory, it is presumed cavalry will not be needed at all at Fort Hartsuff, and the infantry now there can be removed within a year, so that, in view of the immediate necessity of troops occupying the Black Hills at some point north of Fort Laramie, to keep miners and others from encroaching upon the Sioux Indian reserve, and the fact that only about $25,000 will be needed (of the appropriation of $50,000) for the completion of a single infantry post at Fort Hartsuff, I recommend that Congress be asked to appropriate the remaining $25,000, unexpended of the $50,000, for Fort Hartsuff, with $115,000 in addition, to build an eight-company post on the western border of the Black Hills, at such point as the division commander may designate.

It is very important that prompt action should be taken in this matter, as the troops will be needed in the Black Hills as soon as spring opens, and the need will continue as long as the Black Hills are in Indian country, so that the troops, to keep this country free from intruders, must winter there, which they cannot do under canvass, for the

reports show that the temperature ranges from 25° to 45° below zero during cold weather.

I am, sir, very respectfully, your obedient servant,

E.O.C. ORD,
Brigadier-General.

Col. R. C. DRUM,
Assistant Adjutant-General United States Army,
Headquarters Military Division of the Missouri,
Chicago, Ill.

[First indorsement.]

HEADQUARTERS, & C.,
New Orleans, La., January 20, 1875.

Respectfully forwarded through Army headquarters to the Secretary of War. We have so much work on hand, and so many things engaging our attention at present, that I think it would be best to postpone any action looking to the establishment of a post in the Black Hills to another year.

P.H. SHERIDAN,
Lieutenant-General.

[Second indorsement.]

HEADQUARTERS OF THE ARMY,
Saint Louis, January 25, 1875.

Respectfully forwarded to the Secretary of War.

W. T. SHERMAN,
General.

[Third indorsement]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, January 30, 1875.

Respectfully submitted to the Secretary of War.

E. D. TOWNSEND,
Adjutant-General.

[Fourth indorsement.]

Seen by the Secretary of War, February 3, 1875, and concurred in.

H.T. CROSBY,
Chief Clerk.

[Telegram.]

WAR DEPARTMENT,
ADJUTANT-GENERAL'S OFFICE,
Washington, March 16, 1875.

General W. T. SHERMAN,
Commanding United States Army Saint Louis, Mo.:

The President requests you to make public the following:

All expeditions into that portion of the Indian Territory known as the Black Hills country must be prevented as long as the present treaty exists. Efforts are now being made to arrange for the extinguishment of the Indian title, and all proper means will be used to accomplish that end. If, however, the steps which are to be taken toward the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled.

Please acknowledge receipt.

E.D. TOWNSEND,
Adjutant-General.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., March 17, 1875.

SIR: On the 16th instant I had the honor to receive, by reference from the President, a reoslution of the Senate dated the 15th instant, in the following words, viz:

Resolved, That the President be requested to communicate to the Senate, if not incompatible with public interests, any information in his possession in regard to the proposed emigration to the Black Hills country, in the Sioux Indian reservation; whether such emigration is with the consent of the Indian tribes holding said country under the treaty of February 24, 1869; and, if not, what measures will be taken in relation to the same.

The sixteenth article of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, provides as follows:

The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and con-

sidered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or, without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux Nation, the military posts now established in the Territory in this article named shall be abandoned and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

The country thus referred to includes the Black Hills.

As to the proposed emigration to that portion of the Sioux reservation named in the resolution, this Department is in possession of no information except that derived from the public prints, which contain certain reports to the effect that one expedition has succeeded in reaching the Black Hills.

The persons composing said expedition have gone upon the Sioux reservation in violation of the provisions of the treaty, and are in the country referred to against the wishes and without the consent of the Indians.

Statements published in the newspapers indicate a determination on the part of many persons throughout the country to explore the Black Hills in search of minerals.

Measures have been adopted by the Secretary of War, with the concurrence of this Department, to prevent further intrusion upon the reservation in question, and looking to the removal of the persons now unlawfully there.

A military order has been issued to the General of the Army, by the honorable the Secretary of War, to prevent any future expedition into that portion of the Indian Territory known as the Black Hills country as long as the present treaty exists, and advising that efforts are being made to arrange for the extinguishment of the Indian title, and that all proper means will be used to accomplish that end; and that if the steps taken toward the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled.

This Department has taken steps to bring to this city a delegation of the Sioux (parties to the treaty) for the purpose of negotiating for the extinguishment of their right to the reservation embracing the Black Hills country, with a view to opening up the same to settlement, and until such an arrangement has been effected it is the intention of this

Department, with the co-operation of the War Department, to protect the rights of the Indians as guaranteed to them by the treaty of 1868, and to prevent any further infraction of those rights.

It is also the intention of this Department to use every effort possible to extinguish the Indian title to the Black Hills country, and open the same to settlement and explorations for mineral wealth at the earliest day practicable.

Very respectfully, your obedient servant,

C. DELANO,
Secretary.

The PRESIDENT.

43D CONGRESS, 2d Session. } SENATE. { EX. DOC. No. 32.

LETTER

FROM

THE SECRETARY OF WAR,

TRANSMITTING,

In compliance with a Senate resolution of February 23, 1875, *a report of the expedition to the Black Hills, under command of Bvt. Maj. Gen. George A. Custer.*

FEBRUARY 26, 1875.—Ordered to lie on the table and be printed.

WAR DEPARTMENT.
February 25, 1875

The Secretary of War has the honor to transmit to the United States Senate, in compliance with resolution of the 23d instant, report of the late expedition to the Black Hills, under the command of Bvt. Maj. Gen. George A. Custer.

WM. W. BELKNAP,
Secretary of War.

[Telegram.]

HEADQUARTERS BLACK HILLS EXPEDITION,
Eight and a half miles southeast of Harney's Peak,
August 2, (Via Fort Laramie, Wyo., 8, 1874.)

ASSISTANT ADJUTANT-GENERAL,
Department of Dakota, Saint Paul, Minn.:

My last dispatch was dated July 15, and sent from Prospect Valley, Dakota, longitude 103 degrees and 46 minutes, latitude 46 degrees and 29 minutes. Two of my Indian scouts left as bearers of the dispatch as soon as their departure could be concealed by the darkness. After leaving that point this expedition moved in a southwesterly direction

until it reached the valley of the Little Missouri River, up which we moved twenty-one miles. Finding this valley almost destitute of grazing along our line of march, I ordered the water-kegs filled and a supply of wood placed in the wagons, and left the valley in search of a better camp-ground. During our passage up the valley of the Little Missouri we had entered and were about to leave the Territory of Montana. Our course was nearly due south. After further march of about nine miles, we arrived before sundown at a point capable of furnishing us good grazing and water for our animals, having marched over thirty miles since breaking camp in the morning. From this point to the valley of the Belle Fourche we found the country generally barren and uninviting, save in a few isolated places. We reached the Belle Fourche on the evening of the 18th of July, encamping where good grass, wood, and water were abundant, and at a point a short distance above that marked fifteen (15) on Reynold's map, just west of the line separating Dakota from Wyoming. The following day was spent in camp.

On the 20th we crossed the Belle Fourche and began, as it were, skirmishing with the Black Hills. We began by feeling our way carefully along the outlying ranges of hills, seeking a weak point through which we might take our way to the interior. We continued from the time we ascended from the valley of the Belle Fourche to move through a very superior country, covered with the best of grazing and abundance of timber, principally pine, poplar, and several varieties of oak. As we advanced, the country skirting the Black Hills to the southward became each day more beautiful. On the evening of the 22d, we halted and encamped east of and within four miles of the Cave Inyan Kara. Desiring to aside (ascend?) that peak the following day, it being the highest on the western range of the Black Hills, I did not move camp the following day, but, taking a small party with me, proceeded to the highest point of the prominent landmark, whose height is given as 6,600 feet. The day was not favorable for obtaining distant views, but I decided on the following morning to move due east and attempt the passage of the hills. We experienced considerable delay from fallen timber which lay in our pathway. With this exception, and a very little digging, rendered necessary in descending into a valley, the pioneers prepared the way for the train, and we reached camp by 2 o'clock, having marched eleven miles. We here found grass, water, and

wood of the best quality, and in great abundance. On the following day we resumed our march up this valley, which I had explored the preceding evening, and which led us by an easy ascent almost southeast.

After marching nearly twelve miles, we encamped at an early hour in the same valley. This valley, in one respect, presented the most wonderful as well as beautiful aspect. Its equal I have never seen; and such, too, was the testimony of all who beheld it. In no private or public park have I ever seen such a profuse display of flowers. Every step of our march that day was amid flowers of the most exquisite colors and perfume. So luxuriant in growth were they that men plucked them without dismounting from the saddle. Some belonged to new or unclassified species. It was a strange sight to glance back at the advancing columns of cavalry, and behold the men with beautiful bouquets in their hands, while the head-gear of the horses was decorated with wreaths of flowers fit to crown a queen of May. Deeming it a most fitting appellation, I named this Floral Valley. General Forsyth, at one of our halting places, plucked seventeen beautiful flowers, belonging to different varieties, and within a space of twenty feet square. The same evening, while seated at the mess-table, one of the officers called attention to the carpet of flowers strewn under our feet, and it was suggested that it be determined how many different flowers could be plucked without leaving our seat at dinner-table. Seven beautiful varieties were thus gathered. Professor Donaldson, the botanist of the expedition, estimated the number of flowers in bloom in Floral Valley at fifty, while an equal number of varieties had bloomed, or were yet to bloom. The number of trees, shrubs, and grasses was estimated at twenty-five, making the total flora of the valley embrace one hundred and twentyfive species. Through this beautiful valley meanders a stream of crystal water so cold as to render ice undesirable even at noonday. The temperature of two of the many springs found flowing into it was taken, and ascertained to be forty-four and forty-four and one-half degrees respectively. The next morning, although loath to leave so enchanting a locality, we continued to ascend this valley until gradually, almost imperceptibly, we discovered that we were on the crest of the western ridge of the Black Hills, and instead of being among barren peaks, as might be supposed, we found ourselves wending our way through a little park, whose natural beauty may well bear comparison with

the loveliest portions of Central Park. Favored as we had been in having Floral Valley for our roadway to the crest of the Black Hills, we were scarcely less fortunate in the valley which seemed to rise to meet us in the interior slope. The rippling stream of clear, cold water, the counterpart of that we had ascended the day before, flowed at our feet and pointed out the way before us, while along its banks grew beautiful flowers, surpassed but little in beauty and profusion by their sisters who had greeted us the day before. After advancing down this valley about fourteen miles, our course being almost southeast, we encamped in the midst of grazing whose only fault, if any, was the great luxuriance. Having preceded the main column, as usual, with an escort of two companies of cavalry (E and C) and Lieutenant Wallace's detachment of scouts, I came upon an Indian camp-fire still burning, and which, with other indications, showed that a small party of Indians had encamped there the previous night, and evidently left that morning in ignorance of our close proximity. Believing they would not move far, and that a collision might take place at any time unless a friendly understanding was arrived at, I sent my head scout, "Bloody Knife," and twenty of his braves to advance a few miles and reconnoiter the valley. This party had been gone but a few minutes when two of Bloody Knife's young men came galloping back and informed me that they had discovered five Indian lodges a few miles down the valley, and that Bloody Knife, as directed, had concealed his party in a wooded ravine where they awaited further orders. Taking a company with me, which was afterward reenforced by the remainder of the scouts, and Colonel Hart's company, I proceeded to the ravine where Bloody Knife and his party lay concealed, and from the crest beyond obtained a full view of the five Indian lodges, about which a considerable number of ponies were grazing. I was enabled to place my command still nearer to the lodges undiscovered. I then dispatched a guard, the interpreter, with a flag of truce, accompanied by two of our Sioux scouts, to acquaint the occupants of the lodge that we were friendly disposed and desired to communicate with them. To prevent either treachery or flight on their part, I galloped the remaining portion of my advance and surrounded the lodges. This was accomplished almost before they were aware of our presence. I then entered the little village and shook hands with the occupants, assuring them, through the interpreter, that they had no cause to fear, as

we were not there to molest them. I invited them to visit our camp, and promised presents of flour, sugar, and coffee to all who would accept. This invitation was accepted. At the same time, I entered into an agreement with the leading men they should encamp with us a few days and give us such information concerning the country as we might desire, in return for which service I was to reward them with rations. With this understanding, I left them. The entire party numbered twenty-seven. Later in the afternoon, four of the men, including the chief, "One Stab," visited our camp and desired the promised rations, saying their entire party would move up and join us the following morning, as agreed upon. I ordered presents of sugar, coffee, and bacon to be given them, and to relieve them of the pretended anxiety for the safety of their village during the night, I ordered a party of fifteen of my command to return with them and protect them during the night. But from their great disinclination to wait a few minutes, till the party could saddle up, and from the fact that two of the four had already slipped away, I was of the opinion that they were not acting in good faith. In this I was confirmed, when the two remaining ones set off at a gallop in the direction of their village. I sent a party of our scouts to overtake them and request them to return. Not complying with this request, I sent a second party with orders to repeat the request, and if not complied with, to take hold of the bridles of their ponies and lead them back, but to offer no violence. When overtaken by our scouts, one of the two Indians seized the musket of one of the scouts and endeavored to wrest it from him. Failing in this he released his hold, after the scout became dismounted in the struggle, and set off as fast as his pony could carry him, but not before the musket discharged. From blood discovered afterward, it was very evident that either the Indian or his pony was wounded. I hope that neither was seriously hurt, although the Indians have their own bad faith as the sole ground for the collision. "One Stab," the chief, was brought back to camp. The scouts galloped down the valley to the site of the village, when it was discovered that the entire party had packed up their lodges and fled, and the visit of the four Indians to our camp was not only to obtain their rations promised them in return for future services, but to cover the flight of the lodges. I have effected arrangements by which the chief One Stab will be with us as guide three days longer, when he will take his departure and rejoin his band. He claims to

belong to both Red Cloud's and Spotted Tail's agencies, but has been to neither for a long time. He has recently returned from the hostile camp on Powder River, and represents that the Indians lost 10 killed, in their fights with the Bozeman exploring party. The creek which led us down into the interior of the Black Hills is bordered by high bluffs, on the crests of which are located prominent walls of solid rock, presenting here and there the appearance of castles constructed of masonry. From their marked resemblance, I named this stream Castle Creek. The direction of Castle Creek having commenced to lead us more to the northeast than we were prepared to go, and the valley having become narrow and broken, I left this water-course and ascended the valley of a small tributary, which again gave us a southeasterly course. After a march of fourteen miles, encamped on a small creek furnishing us an abundance of water and grass. The direction of this creek was nearly east. On the 30th, moved in the continuation of our previous course, and through a fine open country covered with excellent grazing. After a march over ten miles, we encamped early in the day about five miles from the western base of Harney's Peak—finding water and grass and wood abundant, with springs of clear cold water running through camp. On the following day the command remained in camp, except the exploring parties sent out in all directions. With a small party I proceeded to Harney's Peak, and after great difficulty made the ascent to its crest. We found this to be the highest point in the Black Hills. From the highest point we obtained a view of Bear Butte, in the north part of plains to the east, far beyond the Cheyenne River. Our party did not reach camp till near 1 o'clock that night, but we were amply repaid for our labor by the magnificence of the views obtained. While on the highest point, we drank the health of the veteran out of compliment to whom the peak was named. On the 1st of August we moved camp a few miles, simply to obtain fresh grass, still keeping near the base of the hills to the east of us. This a.m. I dispatched two companies, under Colonel Hart, in a southeasterly direction, to extend our exploration with the South Fork of the Cheyenne River. To-morrow morning at 5 o'clock I will set out with five companies of cavalry and endeavor to reach the same stream in a southwesterly direction from Harney's Peak. Reynolds, the scout who is to carry this dispatch to Fort Laramie, will go with us as far as we go in that direction, when he sets out alone to reach his destination,

traveling mainly by night. The country through which we have passed since leaving the Belle Fourche River has been generally open and extremely fertile. The main portion of that passed over since entering the unexplored portion of the Black Hills consists of beautiful parks and valleys, through which flows a stream of clear, cold water, perfectly free from alkali, while bounding these parks or valley is invariably found unlimited supplies of timber, much of it capable of being made into good lumber. In no portion of the United States, not excepting the famous blue-grass region of Kentucky, have I ever seen grazing superior to that found growing wild in this hitherto unknown region. I know of no portion of our country where nature has done so much to prepare homes for husbandmen, and left so little for the latter to do, as here. The open and timbered spaces are so divided that a partly-prepared farm of almost any dimensions, of an acre and upward, can be found here. Not only is the land cleared and timbered, both for fuel and building, conveniently located, with streams of pure water flowing through its length and breadth, but nature oftimes seems to have gone further and placed beautiful shrubbery and evergreens in the most desirable locations for building-sites, while on Harney's Peak I could contrast the bright-green verdure of these lovely parks with the sunburned and dried yellow herbage to be seen on the outer plains. Everything indicates an abundance of moisture within the space inclosed by the Black Hills. The soil is that of a rich garden, and composed of a dark mold of exceedingly fine grain. We have found the country in many places covered with wild raspberries, both the black and red varieties. Yesterday and to-day I have feasted on the latter. It is no unusual sight to see hundreds of soldiers gathering wild berries. Nowhere in the States have I tasted cultivated raspberries of equal flavor to those found growing wild here, nor have I ever seen them as large or in as great profusion as I have seen hundreds of acres of them here. Wild strawberries, wild currants, gooseberries, two varieties of pure berries, and wild cherries are also found in great profusion and of exceeding pure quality. Cattle could winter in these valleys without other food or shelter than that to be obtained from running at large. As there are scientists accompanying the expedition who are examining into the mineral resources of this region, the result of whose researches will accompany explorations until the return of the expedition, except to state, what will appear in any event in the public prints,

that gold has been found at several places, and it is the belief of those who are giving their attention to this subject that it will be found in paying quantities. I have upon my table forty or fifty small particles of pure gold, in size averaging that of a small pin-head, and most of it obtained to-day from one panful of earth. As we have never remained longer at our camp than one day, it will be readily understood that there is no opportunity to make a satisfactory examination in regard to deposits of valuable minerals. Veins of lead and strong indications of the existence of silver have been found. Until further examination is made regarding the richness of the gold, no opinion should be formed.

Veins of what the geologists term gold-bearing quartz crop out on almost every hillside. All existing geological or geographical maps of this region have been found incorrect. This will not seem surprising when it is remembered that both have been compiled by guess-work and without entering the country attempted to be represented. The health of the command continues excellent. I will begin my northward march in four days from this date. I do not expect to arrive at Fort Lincoln until the 31st of August.

G.A. CUSTER,
Bvt. Maj. Gen. U.S.A., Commanding Expedition.

Postscript, 1030 p.m., August 3.—I left our main camp near Harney's Peak at 6 o'clock this morning with five companies of cavalry, and, after a march in a southerly direction of forty-five miles, reached the south fork of Cheyenne River, at the mouth of a creek flowing from the north and emptying into the Cheyenne midway between the mouths of Hot and Horsehead Creeks. From this point Reynolds, the scout sets out in one hour with this dispatch for Fort Laramie. I reached here at 9 p.m., and will proceed to Harney's Peak by a different route tomorrow morning. The country between here and Harney's Peak is generally open and rolling, and, excepting the southeastern portion, covered with excellent grass.

G.A. CUSTER,
Brevet Major-General, Commanding.

HEADQUARTERS DEPARTMENT OF DAKOTA,
Saint Paul, August 11, 1874.

Official copy respectfully forwarded to headquarters Military Division of the Missouri for the information of the Lieutenant-General, commanding.

ALFRED H. TERRY,
Brigadier-General, Commanding.

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, August 15, 1874.

Respectfully forwarded for the information of the General of the Army.

P.H. SHERIDAN,
Lieutenant-General, Commanding.

HEADQUARTERS OF THE ARMY,
Washington, August 19, 1874

Respectfully forwarded to the Secretary of War, inviting his perusal.

W.T. SHERMAN,
General.

HEADQUARTERS BLACK HILLS EXPEDITION,
Bear Butte, Dak., August 15, (via Bismarck.)

My last dispatch was written on the 2d and 3d instant, and sent from the south fork of the Cheyenne, from a point on the latter nearest to Fort Laramie. On the morning of the 4th instant I began my return march to our main camp, near Harney's Peak, arriving there by a different route on the 6th. On the morning of the 7th the expedition began its march northward, Bear Butte being our next objective point.

We advanced without serious obstacle until within ten or twelve miles of Bear Butte, when we found our further progress barred by a high range of impassable hills. We attempted to effect a passage through some one of the many valleys whose water-courses ran directly through the hills in the desired direction, but in every instance we were led into deep, broken canons, impassable even to horsemen.

Through one of these I made my way on foot, and from a high point near its mouth obtained a view of the plains outside. Retracing my steps, I placed the command in camp in a fine valley, in which it had halted, and devoted the remainder of the day to a further search for a practicable route through the hills. The result decided me to follow down a water-course, which led us first toward the south and afterward toward the east. This stream proved to be Elk Creek, the valley of which, as well as the stream itself proved to be at least equal in beauty and extent to any passed through during our march. We camped twice on this stream, and as far as we proceeded down its course we had

a most excellent road; but finding that, like nearly all other streams leaving the hills, its course would take us into a canon which could be barely made practicable for our wagons, I searched for and discovered a narrower gap in the rocky wall which forms the northern boundary of the valley, and which was conveniently large to allow our wagons to pass through. A march of an hour up a gradual ascent, and through a pine forest, brought us to a beautiful park containing thousands of acres, and from which we obtained a fine view, in the distance, of our old acquaintance—the plains. Here we pitched our tents for the last time in the Black Hills; nearly every one being loath to leave a region which had been found so delightful in almost every respect. Behind us the grass and foliage were clothed in green of the freshness of May. In front of us, as we cast our eyes over the plains below, we saw nothing but a comparatively parched, dried surface, the sun-burnt pasturage of which offered a most uninviting prospect both to horse and rider, when remembering the rich abundance we were leaving behind us. A march of twenty-six miles, gradually bearing northward, brought us to the base of Bear Butte, at which point I concluded to remain one day before beginning our return march. I propose to return by a different, although, perhaps, not shorter, route than that adopted in coming to the Black Hills. I am induced to make this change in order to embrace a larger extent of unexplored country within the limits of our explorations, and particularly to enable us to locate as much as possible of that portion of the Little Missouri of which nothing is now known. I expect the expedition to reach Fort Lincoln on the 31st of August. The health of the command has been, and is, most excellent. This expedition entered the Black Hills from the west side, penetrated through the eastern and most southern ranges, explored the major portions of the interior, and passed out the most eastern ranges which form the boundary of the Black Hills. From the fact that in all our principal marches through the Black Hills we have taken, without serious obstacle, a heavily-laden train of over one hundred wagons, it may be inferred that the Black Hills do not constitute the impenetrable region heretofore represented.

In entering the Black Hills from any direction, the most serious, if not the only obstacles, were encountered at once, near the outer base. This probably accounts for the mystery which has long existed regarding the character of the interior. Exploring parties have contented themselves with

marching around the exterior base, and, from the forbidding aspect of the hills as viewed at a distance, inferred that an advance toward the interior would only encounter increased obstacles. In regard to the character of the country inclosed by the Black Hills, I can only repeat what I have stated in previous dispatches.

No portion of the United States can boast of a richer or better pasturage, purer water, the natural temperature of which in mid-summer, as it flows from the earth, is but twelve degrees above the freezing-point, and of greater advantages generally to the farmer or stock-raiser than are to be found in the Black Hills. Building-stone of the best quality is to be found in inexhaustible quantities. Wood for fuel and lumber sufficient for all time to come. Rains are frequent, with no evidence in the country of either drought or freshets. The season, perhaps, is too short and the nights too cool for corn, but I believe all other grain could be produced here in wonderful abundance. Wheat would particulary yield largely. There is no doubt as to the existence of various minerals throughout the hills, as this subject has received especial attention of experts who accompnay the expedition, and will be reported upon in detail. I will only mention the fact that iron and plumbago have been found, and beds of gypsum of apparently inexhaustible extent.

I referred in a former dispatch to the discovery of gold. Subsequent examinations at numerous points confirm and strengthen the fact of the existence of gold in the Black Hills. On some of the water-courses almost every panful of earth produced gold in small, yet paying, quantities. Our brief halts and rapid marching prevented anything but a very hasty examination of the country in this respect; but in one place, and the only one within my knowledge where so great a depth was reached, a hole was dug eight (8) feet in depth. The miners report that they found gold among the roots of the grass, and, from that point to the lowest point reached, gold was found in paying quantities. It has not required an expert to find gold in the Black Hills, as men without former experience in mining have discovered it at an expense of but little time or labor. As an evidence of the rich pasturage to be found in this region, I can state the fact that my beef-herd, after marching upward of six hundred (600) miles, is in better condition than when I started, being now as fat as is consistent with marching condition. The same may be said of the mules of the wagon-train. The horses of the command are in good

working-condition. I have never seen as many deer as in the Black Hills. Elk and bear have also been killed. We have had no collision with hostile Indians.

G.A. CUSTER,
Brevet Major General, Commanding Expedition.
To ASSISTANT ADJUTANT-GENERAL,
Department of Dakota, Saint Paul.

[Indorsements.]

HEADQUARTERS DEPARTMENT OF DAKOTA,
Saint Paul, Minn., August 22, 1874.

Official copy respectfully forwarded to headquarters Military Division of the Missouri, for the information of the Lieutenant-General, commanding.

ALFRED H. TERRY,
Brigadier-General, U.S.A., Commanding.
By O.D. GREENE,
Assistant Adjutant-General.

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, August 25, 1874.

Respectfully forwarded for the information of the General of the Army.

P.H. SHERIDAN,
Lieutenant-General, Commanding.

HEADQUARTERS OF THE ARMY,
Washington, August 27, 1874.

Respectfully forwarded to the Adjutant-General.
By command of General Sherman and in his absence:

JNO. M. BACON,
Colonel and Aid-de-Camp.

WAR DEPARTMENT, ADJUTANT GENERAL'S OFFICE,
Washington, February 25, 1875.

Official copies:

E. D. TOWNSEND,
Adjutant-General.

[Defendant's Exhibit No. 31, Docket No. 74]

44TH CONGRESS, *2d Session.* SENATE. EX. DOC. No. 9

MESSAGE

FROM THE

PRESIDENT OF THE UNITED STATES,

COMMUNICATING

The report and journal of proceedings of the commission appointed to obtain certain concessions from the Sioux Indians.

DECEMBER 26, 1876.—Read, ordered to lie on the table, and be printed.

To the Senate and House of Representatives:

I have the honor to transmit herewith a letter, submitted by the Secretary of the Interior, from the Commissioner of Indian Affairs, accompanied by the report and journal of proceedings of the commission appointed on the 24th day of August last to obtain certain concessions from the Sioux Indians, in accordance with the provisions contained in the Indian appropriation act for the current fiscal year.

I ask your special consideration of these articles of agreement, as among other advantages to be gained by them is the clear right of citizens to go into a country of which they have taken possession and from which they cannot be excluded.

U.S. GRANT.

EXECUTIVE MANSION, *December* 22, 1876.

DEPARTMENT OF THE INTERIOR,
Washington, December 20, 1876.

SIR: I have the honor to transmit herewith a copy of a letter, dated 19th instant, from the Commissioner of Indian Affairs, accompanied by the report of the commission appointed 24th of August last to visit and treat with the Sioux.

In transmitting this report the Commissioner makes some recommendations with reference to the settlement in the Indian Territory of such of the Sioux Indians as may be willing to go there; which I warmly approve and beg to commend.

I have the honor to be, sir, very respectfully, your obedient servant,

Z. CHANDLER,
Secretary.

The PRESIDENT, *Executive Mansion.*

DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS,
Washington, D.C., December 19, 1876.

SIR: I have the honor to transmit herewith a copy of the report submitted by the commission which was appointed on the 24th of August last to obtain certain concessions from the Sioux, in accordance with provision contained in the Indian appropriation act for the current fiscal year.

I also forward the original journal of the proceedings of the commission, containing full reports of the councils held by them, and a copy of the agreement entered into, which was signed by the chiefs and headmen at seven agencies.

By reference to the instructions issued by this office, copy herewith, it will be seen that the commission has succeeded in the fullest and most satisfactory manner in performing the duties with which they were charged.

By the terms of the agreement, the Sioux surrender all claim to any country lying outside the boundaries of their permanent reserve, as defined by the treaty of 1868, and to so much of said reserve as lies west of the one hundred and third meridian of longitude and as is included between the North and South Forks of the Cheyenne River east of said meridian. The Government thereby secures full possession of a tract of country which includes the Black Hills and is defined by natural boundaries.

The Indians grant a right of way over their reservation for three roads from the Missouri River to the ceded territory—the routes to be designated by the President. They also agree to receive all subsistence and other supplies, which may hereafter be furnished, at such points on or near the Missouri River as the President may designate.

In consideration of these concessions, the commissioners, on behalf of the United States, agree to furnish subsistence to the Sioux until such time as they shall become self-supporting—rations to be issued to heads of families; and in case the Indians are located on lands suitable for cultivation, and educational facilities are afforded by the Government, the issue of rations is to be conditioned on the performance of labor by the Indians and the attendance of their children at school.

Assistance in the way of schools and instruction in the agricultural and mechanical arts, as provided by the treaty of 1868, is guaranteed; the building of comfortable houses on allotments in severalty is provided for; and the Sioux are declared amenable to the laws of the United States. The Indians further agree to select allotments as soon as possible after their removal to their permanent home, and to use their best efforts to cultivate the same.

It will be observed that the agreement contemplates the possible removal of the Sioux to the Indian Territory, and that its terms are made binding wherever the Sioux may be located. In accordance with suggestion contained in their instructions, the commission sent a delegation of ninety Indians from the Red Cloud and Spotted Tail agencies, under the care of Commissioners Boone and Daniels, to the Indian Territory, to examine the country, and to report to their people upon the advisability of removing thither. Copy of the report of Messrs. Boone and Daniels is herewith transmitted.

Such removal is reported to meet the cordial approval of a portion of those who have visited the Territory; but whether the main body of the Indians will decide to make the change cannot be definitely ascertained until the delegation shall have returned to their agencies and consulted with their people. But there seems to be little doubt that a portion, if not all, of the Indians at Red Cloud agency, and perhaps those, or a portion of those, at Spotted Tail agency, will prefer to remove to the Indian Territory rather than to the Missouri River.

The Indian Territory has long been set apart as a permanent home for Indians. Its soil and climate are incomparably superior to those of the Dakota reservation, and a large tract is yet unoccupied upon which the Government has the unquestioned right to place Indians. There would seem to be scarcely a question that, if it is the purpose of the Government to undertake in earnest the civilization of the

Sioux, the true policy is to locate them as rapidly as possible (their own consent being obtained thereto) where the conditions are the most favorable for rapid progress in peaceful arts of agriculture and stock-raising; and certainly no one will contend that any considerable portion of the reservation in Dakota can be compared for such purposes with the larger part of the Indian Territory.

There can be no obstacle in the way of setting apart a reservation for the Sioux in that part of the Indian Territory now owned by the Government. But as that tract lies west of the ninety-sixth meridian, supplies would require to be transported by wagon over a long distance at heavy expense, and their proximity to the Staked Plains would materially increase the difficulty of controlling the Sioux and of bringing them into habits of labor in civilized pursuits.

I therefore respectfully suggest that the Cherokees, Creeks, Choctaws, and Chickasaws have a vastly greater amount of land than they can occupy and cultivate, and that it might be well to consider whether some one or more of these tribes might not consent to relinquish, for a fair consideration, a sufficient amount to afford a reservation for these Sioux. I am led to hope that such cession might be obtained on fair and equitable terms, for two reasons:

1st. It must be obvious to every intelligent man in the so-called civilized tribes, that land in excess of the amount which can be profitably used is of little or no value.

2d. They must be aware that so long as they hold vast areas of valuable land, lying, and destined to lie as long as they hold it, an unprofitable and unimproved waste, the cupidity of tens of thousands of white men is thereby excited—a cupidity which, already almost uncontrollable, will increase in intensity from year to year till it becomes irresistible. It is vain and idle to expect or hope that 55,000 Indians shall exclusively hold for a great length of time more than twenty millions of acres of the most desirable uncultivated lands now in the United States.

I therefore respectfully suggest that Congress be asked to authorize a negotiation for the purchase from one or more of the civilized tribes of a portion of their lands, and to grant authority, if such negotiation can be effected, to remove the Sioux Indians thither from time to time, as may be practicable and as their consent to such removal may be obtained; or, if such purchase cannot be effected, that authority be granted and provision made for the removal of

said Indians to that part of the Indian Territory which lies west of the ninety-sixth meridian.

I have the honor to be, sir, very respectfully, your obedient servant,

J.Q. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
August 24, 1876.

GENTLEMEN: You have been appointed by the President as members of the commission to negotiate with the Sioux Indians, pursuant to the following provisions contained in the Indian appropriation act for the current fiscal year:

"*Provided*, That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people, and hereafter there shall be no appropriation made for the subsistence of said Indians unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permenent reservation established by the treaty of 1868 for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon and other roads from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for by said treaty of 1868 at such points and places on their said reservation and in the vicinity of the Missouri River as the President may designate. And the further sum of $20,000 is hereby appropriated, to be expended under the direction of the President of the United States, for the purpose of carrying into effect the foregoing provision: *And provided also*, That no further appropriation for said Sioux Indians shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States which is calculated and designed to enable said Indians to become self-supporting: *Provided further*, That the Secretary of the Interior may use of the foregoing amounts the sum of $25,000 for the removal of the Poncas

to the Indian Territory and providing them a home therein, with the consent of said Indians."

It will be seen from the above that Congress has expressed its determination to appropriate nothing further for the subsistence of the Sioux Indians represented directly or indirectly by the treaty of 1868, unless they shall agree—

1st. To relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of 1868.

2d. To relinquish all right and claim to so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude.

3d. To grant right of way over the permanent reservation to that part thereon which lies west of the one hundred and third meridian of longitude for wagon and other roads from convenient and accessible points on the Missouri River, not exceeding three in number.

4th. To receive all such supplies as are provided for by said act and by said treaty of 1868, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate.

5th. To enter into such agreement or arrangement with the President of the United States as shall be calculated and designed to enable said Indians to become self-supporting.

The subjects of negotiation, with the exception of the last, are so clearly defined by the act as to render further elaboration upon my part unnecessary.

One of the most important subjects of negotiation is that represented by the fifth clause, and the President is strongly impressed with the belief that the agreement which shall be best calculated to enable the Indians to become self-supporting is one which shall provide for their removal, at as early a day as possible, to the Indian Territory, and that the solution of the difficulties which now surround the "Sioux problem" can be best reached by such removal. Their main dependence for support must ultimately be the cultivation of the soil, and for this purpose their own country is utterly unsuited. The superior climate and soil of the Indian Territory, and the fact that that Territory is forever secured to the Indian people, should be fairly and strongly presented to the Indians as inducements for them to enter into such an agreement. For the past three years they have been kept from starvation by large appropriations for their subsistence. These appropriations have been

a matter not of obligation but of charity, and the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government and upon full evidence of their disposition to undertake in earnest measures for their own advancement and support.

The considerations to be offered the Indians in return for the cession proposed should in no case take the form of a cash annuity, not only because of the probable difficulty of making them realize the value of any consideration expressed in money, but also because experience with other tribes has abundantly shown that expenditures by the Government will be of the best service to the Indians when made for them in providing subsistence, clothing, medical advice, agricultural implements, stock, houses, and schools. It is believed that the Government, in case of their removal to the Indian Territory, will willingly furnish them the needed assistance of that character until they can care for themselves. If, however, they decline to agree to such removal, they should be informed that they will be obliged to go to the Missouri River to receive such supplies as may be provided—in probably scanty and diminishing quantities—under further acts of Congress and the existing treaties with them.

If an agreement for the removal of the Sioux to the Indian Territory cannot be obtained without first affording them an opportunity to visit that country, and you are of opinion that such visit would probably secure their assent to such removal, you are authorized to send, under careful and competent direction, or, if practicable, to take, to said Territory a delegation of the most influential chiefs and headmen.

As the legislation under which you act contemplates the removal of the Poncas to the Indian Territory, you will take into consideration the propriety and expediency of locating some of the Sioux on that part of the reservation thus to be vacated, and you will be prepared to make recommendations to the President as to the points on the Missouri River at which supplies as shall be provided for the Sioux may be distributed with the greatest economy and advantage.

If any agreement shall be concluded, you will impress upon the Indians the fact that it will be binding on neither party until it shall have received the approval of the President of the United States and of Congress.

It is not expected that you will define any line of right of way for roads through the reservation; that should be left in the agreement to be designated by the President.

The commission is authorized to hold its sessions at such agencies and places as it may deem necessary or advisable.

The first meeting will be held at Omaha, Nebr., on Monday, the 28th instant.

The commission will make full report of their doings, and of any arrangement which shall be entered into with said Indians, and submit the same for the consideration of the Department, with such recommendations as they may deem proper.

Hon. A.S. Gaylord, Assistant Attorney-General, will act as the legal adviser of the commission, and will represent the Interior Department.

Very respectfully, your obedient servant,

J.Q. SMITH,
Commissioner.

Hon. GEO. W. MANYPENNY,
Columbus, Ohio.
H.C. BULIS, Esq.,
Decorah, Iowa.
NEWTON EDMUNDS, Esq.,
Yankton, Dak.
Rt. Rev. H.B. WHIPPLE,
Faribault, Minn.
A.G. BOONE, Esq.,
Denver, Colorado.
Hon. A.S. GAYLORD,
Assistant Attorney-General, Washington.
General H.H. SIBLEY,
Saint Paul, Minn.
J.W. DANIELS, ESQ.,
Saint Peter, Minn.

WASHINGTON, D.C., *December* 18, 1876.

SIR: The commissioners appointed by the President to negotiate an agreement with the Sioux Indians, parties to the treaty of 1868, pursuant to the following provisions of an act of Congress passed August 15, 1876, which "provided that none of said sums appropriated for said Indians shall be paid to any band thereof while said band is engaged in

hostilities against the white people; and hereafter there shall be no appropriations made for the subsistence of said Indians unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of 1868 for said Indians, and also so much of the said permanent reservation as lies west of the one hundred and third meridian of longitude; and shall also grant the right of way over said reservation to the country thus ceded for wagon or other roads from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all supplies herein provided for by said treaty of 1868, at such points and places on their reservation, and in the vicinity of the Missouri River, as the President may designate; * * * * and provided also that no further appropriation for said Sioux Indians shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States which is calculated and designed to enable said Indians to become self-supporting," respectfully report:

The commission accepted the trust confided to them under the grave responsibility that if they failed in their mission the twenty thousand friendly Indians at the agencies must either starve or join the hostile Indians.

We held our first meeting at Omaha, Nebr., August 28, 1876. All the members of the commission were present, with the secretary and official interpreter.

General H.H. Sibley informed his colleagues that he would not be able to accompany them, on account of his ill health. At our request he gave us his views upon our relations to the Sioux Indians. We deeply regretted that he could not assist us in our arduous duties, for which, by his intimate knowledge of Indian character and his long experience with the Sioux in peace and war, he was so well qualified.

Our first council was held on the 7th day of September at Red Cloud agency, with the chiefs and headmen of the Ogallalla Sioux and Northern Cheyennes and Arapahoes, who represented 4,901 Indians who were then present at the agency. Red Cloud and other of the chiefs met us upon our arrival with warm welcomes, and said with deep earnestness, "We are glad to see you; you have come to save us from death."

We submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular. We assured them that Congress and the President had given us full authority to devise a plan to save their people from death and lead them to civilization. The plan submitted by us was as follows:

1. To provide ample rations for their subsistence until able to support themselves, such rations in all cases to be issued to the head of each separate family.

2. That when said Indians shall be located upon land suitable for cultivation, rations shall be issued only to those persons who labor, the sick, infirm, and aged excepted.

3. That whenever the Government shall establish schools, as provided by the treaty of 1868, no rations shall be issued to children between the ages of six and fourteen years, the sick and infirm excepted, unless said children shall regularly attend school.

4. That whenever any one of the Indians shall in good faith begin to cultivate the soil he shall have a title to his land and receive aid to build a house.

5. That they shall be subject to the laws of the United States, and select as many headmen from each band to maintain order as the President may deem necessary.

6. That all agents, traders, farmers, carpenters, blacksmiths, and other employes of the Government within their reservation shall be lawfully married and living with their families on the reservation.

7. That no person of white or mixed blood, whose fitness morally or otherwise is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of the Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

These provisions were carefully explained and interpreted, and were thoroughly understood by all the Indians. A copy of the agreement was given to them to take to their own council.

The Indians were in council at their camp on Shadron Creek until the 18th, when we requested an answer. Chief Little Wound came to the agency and said, "You are wise men and you have had time. Our councils may not seem of much importance to you, but to us it seems a very serious matter to give up our country. You must have patience and bear with us." We held council with the Indians on the 19th and 20th of September, and after mutual explanations the agreement was duly signed.

On the 21st, we proceeded to Spotted Tail agency to receive an answer to the same propositions, which had been submitted by two of our number on the 14th. After two days' council with the chiefs and headmen of Brulé Sioux, who represented 4,607 Indians then at this agency, the agreement was duly signed.

On the 2d of October, the commission, by the authority of the Commissioner of Indian Affairs, detailed Col. A.G. Boone and Dr. J.W. Daniels as a committee to take a delegation of the Red Cloud and Spotted Tail Indians to the Indian Territory.

We arrived at Standing Rock agency on October 9, and submitted the propositions to the chiefs and headmen of the Upper and Lower Yanctonais, Uncpapas, and Blackfeet Sioux, who represented 2,344 Indians then present at this agency. The agreement was signed on the evening of the 11th.

We reached Cheyenne River agency on the 13th, and submitted the propositions to the chiefs and headmen of the San Arcs, Two Kettles, Minneconjoux, and Blackfeet Sioux, who represented 2,929 Indians then present at this agency. The agreement was signed on the evening of the 16th.

We arrived at Crow Creek agency on the 20th, and met the chiefs and headmen of the Lower Yanctonais, who represented 1,213 Indians then present at this agency. The agreement was signed on the 21st.

We reached Lower Brulé agency on the 23d, and met the chiefs and headmen of the Lower Brulé, who represented 1,002 Indians then present at this agency. The agreement was signed on the evening of the 24th.

We reached Santee agency on the 26th, and met the chiefs and headmen of the Santee Sioux, who represented 855 Indians then present at this agency. The agreement was signed on the 27th.

At all of these agencies the provisions of the agreement were made perfectly plain to the Indians, having been fully explained to them. The Indians on the Missouri River, with the exception of the Santees, objected to visiting the Indian Territory, and a supplementary clause was made exempting them from that part of the agreement.

We finished our labors in the Indian country with our hearts full of gratitude to God, who had guarded and protected us, and had directed our labors to a successful issue. We owe much of our success to the ability and fidelity of Rev. S.D. Hinman, in faithfully interpreting our views to

the Indians. He took part in all our deliberations, and we gained much valuable information from his long experience in Indian affairs and intimate knowledge of Indian character.

We desire to express our obligations to our secretary, C.M. Hendley, for his faithful labors, and for the economical and judicious expenditure of moneys intrusted to his care. It was owing to his ability in stenographic reporting that we were able to preserve a faithful report of every speech made by the Indians and the commission.

While the Indians received us as friends, and listened with kind attention to our propositions, we were painfully impressed with their lack of confidence in the pledges of the Government. At times they told their story of wrongs with such impassioned earnestness that our cheeks crimsoned with shame. In their speeches, the recital of the wrongs which their people had suffered at the hands of the whites, the arraignment of the Government for gross acts of injustice and fraud, the description of treaties made only to be broken, the doubts and distrusts of present professions of friendship and good-will were portrayed in colors so vivid and language so terse, that admiration and surprise would have kept us silent had not shame and humiliation done so. That which made this arraignment more telling was that it often came from the lips of men who were our friends, and who have hoped against hope that the day might come when their wrongs would be redressed.

Said a chief to a member of our commission, "If you white men had a country which was very valuable, which had always belonged to your people, and which the Great Father had promised should be yours forever, and men of another race came to take it away by force, what would your people do? Would they fight?"

Another chief said, "I am glad to see you, you are our friends, but I hear that you have come to move us. Tell your people that since the Great Father promised that we should never be removed we have been moved five times?" He added, with bitter irony, "I think you had better put the Indians on wheels and you can run them about wherever you wish."

Again and again the Indians spoke with sorrow of the present war, and urged us "to rub it out." They said, "Tell the white people that this is not an Indian war; it is a white man's war." It seemed strange for Christian men to hear from the lips of a savage, "A great many widows and or-

phans have been made on both sides. It is time to ask who is to take care of them. This matter has not been begun with judgment;" and then, with deep earnestness, he added, "It is displeasing to the Great Spirit." It made your commissioners remember the words of Jefferson, "I tremble for my country when I remember that God is just."

The accompanying report of Messrs. Boone and Daniels will show the character of the country visited in the Indian Territory and the impression made upon the minds of the delegation from Red Cloud and Spotted Tail agencies. Under our instructions, these Indians had the option to remove to the Indian Territory or the Missouri River. From the information received the commission believe that, if the Indians are to be made self-supporting as speedily as possible, they ought to be removed to the Indian Territory at as early a day as practicable. We are unanimous in the opinion that these Indians can, for the present, find homes on the Missouri River; but we do not think they will ever become a self-sustaining people there. We do not think that it would be advisable at this time to remove the large proportion of the Sioux to the Indian Territory; but in view of the fact that it is the only valuable country upon which Indians can be located, that this country has been set apart by the most solemn guarantees as the future home of the Indians, that to open any part of this Territory to white settlers would be a violation of the nation's plighted faith, and that here the Indians can become a self-supporting people, we believe that it is just and humane to remove to this Territory, from time to time, bodies of the Sioux who are ready and prepared to live by labor.

We recommend that the Upper Yanctonais at Standing Rock be joined to the Lower Yanctonais at Crow Creek agency. It would involve no additional expense for agency buildings or employés; and we think the location, for soil and timber, is equal to any on this part of the Missouri River.

We concur in the recommendation of the Commissioner of Indian Affairs that the Poncas, who speak the same language, shall be removed to the Osage reservation in the Indian Territory. If the Upper Brulés at Spotted Tail agency elect to remove to the Missouri River, we recommend that they be located on the Ponca reservation. In case they should go to the Indian Territory, we recommend that this reservation be given to the Indians now at Cheyenne River agency.

We recommend that, in case the Red Cloud Indians decide to go to the Missouri River, they be located at the Standing Rock agency. In that case the Cheyenne River agency Indians could be located at the Great Bend. The liability to drought, the plague of locusts, and the character of the soil make this country better fitted for a pastoral than an agricultural people. If the Indians remain here permanently, it must be long years before they can become self-supporting. We are convinced that the surest way to aid them in civilization will be to furnish them, under proper restrictions, cattle and teach them stock-raising.

Our examination of this country was necessarily slight. We recommend that, before any considerable expense is incurred in the permanent location of Indians on the Missouri River, a thorough examination of the country be made by competent men.

The present condition of the Sioux Indians is such as to awaken the deepest sympathy. They were one of the finest bodies of Indians on this continent. Nicolet, who visited the different tribes of North American Indians, said that they were superior to any wild men whom he had seen. They were our friends. The officers of the Northwest Fur Company bear testimony to their uniform friendship to the whites. They say that it was the boast of the Sioux in every council for thirty-five years that their hands had not been stained with the blood of the white man. (See Sibley's letter.) If many of this powerful tribe have been changed to relentless foes, we must not forget that it is the simple outcome of our own Indian training school. They occupied the greater portion of a territory which extended from the Mississippi River to the Rocky Mountains and from the British possessions to the northern boundary of Kansas. They lived by the chase. The fish of their lakes and rivers, the herds of deer, elk, and buffalo in forests and prairies, the wild rice and fruits, made their country an Indian paradise.

In 1825 the Government made a treaty of friendship with the Ogallalla Teton, Yankton and Yanktonais Sioux. The Indians admitted that their residence was within the territorial limits of the United States, acknowledged its supremacy, and claimed its protection. The United States pledged to them its protection, and agreed "to extend to them from time to time such benefits and acts of kindness as may be convenient, and in the opinion of the President just as proper." From 1825 to 1851 a few unimportant treaties, designed to meet some emergency, were made. In

1851 the vast emigration to California across the Indian Territory made a new treaty necessary. This was made at Fort Laramie in September, 1851, "between the United States and Sioux or Dacotahs, the Cheyennes, Arapahoes, Crows, Assinaboines, Gros Ventres, Mandans, and Arickarees, residing south of the Missouri River and east of the Rocky Mountains, and north of the boundary-lines of Texas and New Mexico." This treaty establishes and confirms peaceful relations; the Indians agree "to abstain from all hostilities against each other;" they concede to the United States the right to make military or other roads across their territory, and they agree to make full restitution for any wrongs committed by them upon the citizens of the United States while passing through their territories. The Government agrees to pay to these Indians the sum of $50,000 for fifty years. The Senate amended the treaty by limiting the appropriation to ten years. This amendment was never submitted to the Indians. They believed that the original treaty was in force. It is now more than ten years since the appropriation ceased. It is believed that this was the cause of the Powder River war. Generals Sherman, Harney, Terry, and others used these words:

The moment the war of the rebellion was over, thousands of our people turned their attention toward the treasures of Montana. The Indian was forgotten. It did not occur to any man that this poor, despised red man was the original discoverer and sole occupant for many centuries of every mountain seamed with quartz and every stream whose yellow sand glittered in the noonday sun. He asked to retain only a secluded spot where the buffalo and elk could live, and that spot he would make his home. The truth is, no place was left for him.

The conflicts which grew out of our bad faith induced Congress to create a mixed commission of representative men from the Army and civil life, to establish peace with hostile Indians, to ascertain their causes of complaint, and, if deemed advisable, to make treaties with them which should remove all causes of war, protect the frontier settlements, and lead to the civilization of the Indians. Generals W.T. Sherman, W.S. Harney, Alfred H. Terry, and C.C. Augur, and Messrs. N.G. Taylor, J.B. Hendersson, S.F. Tappath, and J.B. Sanborn, composed that commission.

After the most careful examination into the causes of this war, these gentlemen declare that we are alone responsible. They use words which ought to be written in letters of gold and read by every citizen. They say: The Indian, although a barbarian, is yet a man susceptible to those feelings which respond to magnanimity and kindness. The injunction to do good to them that hate us is not confined to race, but is as broad as humanity itself. This truth, for the practical man seeking a solution of these troubles, will serve a better purpose than whole pages of theories upon Indian character. It was found by the commission that the Indians were not willing to make another treaty unless they could have the pledge that no white man should ever enter the territory guaranteed to them. The commissioners evidently sympathized with the fears of the Indians, for they say: "If the lands of the white man are taken, civilization justifies him in resisting the invader. Civilization does more than this—it brands him as a coward and a slave if he submit to the wrong. Here civilization made its own compact and guaranteed the rights of the weaker party. It did not stand by the guarantee. The treaty was broken, but not by the savage. If the savage resists, civilization, with the Ten Commandments in one hand and the sword in the other, demands his immediate extermination. That he goes to war is not astonishing. He is often compelled to do so. Wrongs are borne by him in silence that never fail to drive civilized men to deeds of violence. Among civilized men war usually springs from a sense of injustice. The best possible way, then, to avoid war is to do no act of injustice. When we learned that the same rule holds good with Indians, the chief difficulty is removed. But it is said that our wars with them have been almost constant. Have we been unformly unjust? We answer unhesitatingly, "yes." These are words coming from brave men, who had grown gray in the service of the country. They were compelled to confess the nation's shame, by the facts which they had themselves investigated. They consulted the Government and agreed to the conditions required by the Indians. They did more; they pledged, so far as they could do, their solemn faith that this treaty should be observed.

We need not recapitulate the provisions of the treaty. It guaranteed the Indian's right to hunt in the Powder River country where there were plenty of buffalo, and pledged the aid needed by a nomadic race. The treaty made provision for those who remained on the reservation to aid them in the work of civilization. This treaty, after a full knowledge of the facts presented in the report, was ratified by

the Senate and approved by the President. Every sentiment of honor, justice, and kindness demanded that it should be faithfully observed.

Treaties are made by the Constitution of the United States the supreme law of the land. The United States Supreme Court has declared them binding upon the nation. Pity for the poor and helpless, and fear of the judgments of God, ought to have appealed to the hearts of the people to stand by its plighted faith. The Constitution says that "All treaties made at which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." The ordinance passed for the government of the territory north west of the Ohio River July, 1787, declares that the utmost good faith shall always be observed toward the Indians; their lands and property shall never betaken from them without their consent, and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars *authorized by Congress;* but laws founded in justice and humanity shall from time to time be made for preventing wrongs being done to them, and for preserving peace and friendship with them. From the days of George Washington, every President has had some form joined with Congress in a solemn pledge that this organic law of the nation shall be observed. In the light of recent events we may ask by what authority has war been inaugurated with the Sioux Indians, their property seized without discrimination between friends or foes contrary to the express provisions of this ordinance, and when our own people and the whole civilized world know we are the aggressors. It has been claimed that all Indians who are found outside of their reservation shall be regarded as hostile. We find that in a report made by General W.S. Harney, November 23, 1868, then in charge of the Sioux Indians, he says: "I am perfectly satisfied with the success which has attended the commencement of this work, and can unhesitatingly declare that to secure perpetual peace with the Sioux Indians it is only necessary to fulfill the terms of the treaty made by the peace commission." It shows the friendly character of the Sioux in the winter of 1868 and 1869.

June 29, 1869, General Sheridan says, in an official order, all Indians when on their proper reservations are under the

exclusive control and jurisdiction of their agents they will not be interfered with in any manner by the military authority, except upon requisition of the special agent resident with them, his superintendent, or the Bureau of Indian Affairs at Washington. Outside the well-defined limits of the reservation they are under the original and exclusive jurisdication of the military authority, *and as a rule will be considered hostile.*

The above order is the more surprising to us when we remember that the treaty made by General Sherman and others expressly provided that these Indians might hunt upon the unceded territory; and we find that so late as its last session Congress appropriated $200,000 to be used in part for the payment of the seventh of thirty installments *"for Indians roaming."* We repeat that, under this treaty, it is expressly provided that the Indians may hunt in the unceded territory north and west of the Sioux reservation, and until last year they had the right to hunt in Western Nebraska. We believe that our failure to recognize this right has led to many conflicts between the citizens and Army of the United States and the Indians.

In 1874, the late lamented General Custer made an expedition to the Black Hills. It was done against the protest of the Indians and their friends, and in plain, direct violation of the treaty. Gold was discovered; white men flocked to the El Dorado. The faith of the Government was pledged to protect the Indians against all intrusion upon their land. In the words of those who made the treaty, we say, "None are more anxious than we see to this agricultural and mineral wealth developed by an industrious, thrifty, and enlightened population. We would only be understood as doubting the purity and genuineness of that civilization which reaches its ends by falsehood and violence, and dispenses blessings that spring from violated rights."

Notwithstanding the gross violation of the treaty, no open war ensued. There were instances of conflict between small bands of Indians and whites; thefts and robberies were committed; small war parties made raids upon the settlements. If our own people had a sad story of wrongs suffered from the Indians, we must not forget that the Indians who own no telegraph-lines, who have no press and no reporters, claimed that they, too, had been the victims of lawless violence, and that they had had a country of untold value wrested from them by force. Secretary J.D. Cox, speaking of like conflicts, under date of March 7, 1870, says:

"I believe that any fair investigation of the origin of Indians troubles on the frontier will show that it is unjust to put the whole blame on the savages, and until we can at least show to the world proofs of scrupulous good faith on our part, we shall not be justified in treating Indians as outlaws doomed to summary destruction." Major General Stanley at the same time writes from Dakota, that he is "ashamed longer to appear in the presence of the chiefs of the different tribes of the Sioux, who inquire why we do not do as we promised, and in their vigorous language aver that we lied." Sitting Bull, who had refused to come under treaty relations with the Government, based his refusal in these words, sent to the commission of which Assistant Secretary Cowen was chairman: "Whenever you have found a white man who will tell the truth, you may return, and I shall be glad to see you."

In 1875, a commission was sent out to treat for the surrender of the Black Hills. We believe that this commission failed to make a treaty with the Indians, simply because they had no authority to offer them any sum which would be a just equivalent for their right in the Black Hills, or which gave to the Indians hopes for the future.

We now come to the origin of the present war. It appears that Inspector E.C. Watkins, under date of November 9, 1875, made complaint to the Indian Bureau that Sitting Bull and other Indians with him, residing in the unceded territory, were engaged in making raids upon friendly Indians and the white settlers of Montana. He recommended that "a force of one thousand men should be sent to compel them to submit to the Government." The Secretary of the Interior referred this letter to the Secretary of War for consideration and action. In the letters of Generals Terry, Sheridan, and Sherman, and those of the officials of the War and Interior Departments, we find no reference to any hostile Indians except the "followers of Sitting Bull."

We agree as to the necessity of compelling hostile Indians to submit to the authority of the Government. It is alike unjust to friendly Indians and to the whites were the lawless and turbulent are allowed to go unpunished. The Indians and their friends have always complained of this neglect. But we do deplore any action which makes no discrimination between friends and foes, and which overwhelms the innocent with the guilty.

In the early part of the winter of 1875-'76, many Indians from the different agencies went out with the consent of

their agents to hunt buffalo in this unceded territory. They had the right to do this under the treaty. There was more reason for them to go at this time, because there was an insufficient supply of provisions at the agencies. December 6, 1875, the late Commissioner of Indian Affairs sent instructions to the several agents to notify the Indians in the unceded territory to come to the agencies before the 31st of January, 1876, or that they would be regarded as hostile. This letter reached the Cheyenne River agency on the 20th and Standing Rock on the 22d. Agent Bingham says, under date January 26, 1876, that "the Indians have never been so quiet or friendly-disposed as they are now, and the imtimation of a renewal of hostilities was a surprise not only to me but to all of the Indians under my charge." The runner who was sent by Agent Bingham to notify the Indians to return to the agency was not able to return himself until February 11, 1876. He brought back word that "the Indians received the invitation and warning in good spirit and without any exhibition of ill feeling. They answered that they were then engaged in hunting buffalo and could not accept the invitation at present, but would return to the agency early in the spring."

It does not appear that any one of the messengers sent out by the agents was able to return to his agency by the time which had been fixed for the return of the Indians. It is very easy to understand why the most friendly Indians should hesitate to traverse a pathless country without fuel or shelter, at a time of year when fearful storms endanger human life, and with the knowledge that they would find a limited supply of provisions at the agency. In General Sheridan's report of November 25, 1876, we find that he states that on account of the terrible severity of a Dakota winter the Army were compelled to suspend operations. If our soldiers were frost-bitten and unable to remain in the field even with their comfortable clothing and supply-train, we can judge whether it was practicable for women and children to cross this inhospitable wilderness in the dead of winter.

It is an undoubted truth that there are large numbers of Indians who are now absent from the agencies. They are of three classes:

1st. The larger part made up of those who go every year to hunt the buffalo in the country along the tributaries of the Yellowstone, as provided in the treaty;

2d. Those who became alarmed and left the agencies

when they saw large bodies of troops camped among them; and

3d. Those who voluntarily left the friendly Indians and joined the fortunes of Sitting Bull. The absence of these Indians from the agencies when the recent census was taken is liable to mislead Congress in making their estimates for the future support of the Sioux Indians.

The charge is made that the agency Indians are hostile, and that they have furnished ammunition and supplies to the Indians with Sitting Bull. When we remember that during a very considerable portion of this year there was a deficiency of provisions at all the agencies, and that Indians left with the knowledge and consent of the agents to procure food, we cannot believe that the hostiles received their supplies from agency Indians, nor do we believe that the Indians have procured their improved arms and ammunition at the agencies. There is water-navigation for 3,000 miles through this territory, and an unguarded border of several hundred miles along the Canadian frontier. So long as the Indians will sell buffalo-robes at a low price and pay two prices for guns, the greed of white men will furnish them. It is gross injustice to the agents and the Interior Department to accuse them of furnishing arms and ammunition for Indians to fight our Army and murder our citizens.

Of the results of this year's war we have no wish to speak. It is a heart-rending record of the slaughter of many of the bravest of our Army. It has not only carried desolation and woe to hundreds of our own hearthstones, but has added to the cup of anguish which we have pressed to the lips of the Indian. We fear that when others shall examine it in the light of history, they will repeat the words of the officers who penned the report of 1868: "The results of the year's campaign satisfied all reasonable men that the war was useless and expensive. To those who reflected on the subject, knowing the facts, the war was something more than useless and expensive: it was dishonorable to the nation and disgraceful to those who originated it.

We hardly know how to frame in words the feelings of shame and sorrow which fill our hearts as we recall the long record of the broken faith of our Government. It is made more sad, in that the rejoicings of our centennial year are mingled with the wail of sorrow of widows and orphans made by a needless Indian war, and that our Government has expended more money in this war than all the religious

bodies of our country have spent in Indian missions since our existence as a nation.

We are impelled, in this connection, to sumbit our views in relation to the management of Indian affairs. Until 1832, the War Department had the entire management of the Indians, without the machinery of the Indian Bureau. The chief duties were performed by post-commanders, subject to the Army rules in making disbursements. After a trial of this mode of dealing with Indians for half a century, the Hon. James Barbour, Secretary of War under President J.Q. Adams, frankly states, in an official document, that "we have essentially failed, the sad experience of every day but too strongly testifies." It is now, therefore, that "a most solemn question addresses itself to the American people, and whose answer is full of grave responsibility. Shall we go on quietly in a course which threatens their extinction, while their past suffering and future prospects so pathetically appeal to our compassion? The responsibility to which I refer is what a nation owes to itself, to its future character in all time to come. For next to the means of self-defense and the blessings of free government, stands, in point of importance, the character of a nation?"

In 1832, an act was passed providing for the appointment of a Commissioner of Indian Affairs; but, by order of the President, he was made subject to the Secretary of War, who prescribed rules and regulations for his government. The provisions of this act were so defective that, in 1834, a committee of Congress, who made an investigation into its affairs, declared that immediate revision was imperatively demanded. This report says "the system is expensive, inefficient, and irresponsible." In 1842, another committee of Congress examined the management of Indian affairs in the War Department, and said: "The evidence is submitted as to the general management and condition of Indian affairs. It exhibits an almost total want of method and punctuality, equally unjust to the Government and the tribes to whom we have voluntarily assumed obligations which are not at liberty to disregard. It will be seen that the accounts of millions of expenditures have been so loosely kept as scarcely to furnish a trace or explanation of large sums, and that others have been misapplied, so as to impose serious losses on the Indians and heavy responsibility on the Government; that in some books (the only record of these accounts) no entries have been made for a period of several years, and that where entries have been made, the very

clerks who kept them could not state an account from them."

Notwithstanding this report, no change was made until 1849, when the bureau was transferred to the Interior Department. This transfer did not emancipate the bureau. It was left in a subordinate position, subject to the control of a Secretary who, whatever his ability and integrity and desire to discharge his duty to the Indians faithfully, has found it impossible to devote that personal attention to Indian affairs which their importance demands.

If we trace the management of Indian affairs in the Interior Department since 1849 we find much to call for prompt action to remedy existing evils.

We submit that the remedy for these evils is not to be found by again placing the care of the Indians in the War Department. It had this duty for nearly three quarters of a century, and during the whole period there is no page in history of our Indian management upon which our recollection can linger with emotions of pleasure. We do not question the integrity of the officers of the Army. We concedeto them the same ability and integrity which are to be found in all professions. No one will contend that, in order to insure integrity in the administration of the postal service, the land department, or the customs, it is necessary to remit these departments to the Army; and yet, if the claim be allowed in the management of Indian affairs, we can see no reason why every department should not be controlled by the Department of War. The generals who made the treaty of 1868 say, "If we intend to have war with them, the bureau should go to the Secretary of War; if we intend to have peace, it should be in a civil department. In our judgment such wars are wholly unnecessary, and, hoping that the Government and the country will agree with us, we cannot advise the change."

The habits and tastes of the officers of the Army are foreign to those patient labors which are necessary to lead a savage race to civilization. The officers of rank and experience who may, in some degree, be fitted for this work would not accept the trust, and we fear that this responsible position would be either intrusted to junior officers or to men who had been foisted into the Army as a reward for political services.

We cannot see that any reform will be secured by the removal of this bureau from one building to another. The same evils complained of in the agents of the Indian Bureau

will follow in the agents of the War Department. The whole country was excited over the charges of fraud which were made against the civil agent at Red Cloud agency for the over-estimate in weight in beef-cattle and other issues to the Indians. During our visit at this agency we witnessed an issue of beef made under direction of an officer of the Army, who was the temporary agent. The number of cattle issued was 153 and the average weight estimated was 354 pounds. This average attracted our attention, and after investigation and careful calculation by an experienced officer of the Army, it was believed that the actual weight did not exceed 786 pounds, making in this one issue a loss to the Indians and a gain to the contractor of 27,234 pounds of beef. We did not have the slightest doubt of the integrity of the officer acting as Indian agent. There were no scales, and we doubt whether the experience of this agent was such as to make him a competent judge of the weight of live cattle.

We are impelled to say that it is our unanimous recommendation that all of these Indians ought to be placed as speedily as possible in the care of civil agents.

We have no desire to criticise the strictly military operations of the Army; but we owe it to ourselves to express our deep sense of the wrong committed against friendly Indians by seizing their arms and ponies. While at Cheyenne River agency the chiefs came to us and said that they had heard a rumor that the arms and ponies of friendly Indians were to be seized. They said this rumor had already caused many Indians to leave the agency. We knew that the civil agents and some of the military officers had assured the Indians that those who had remained at the agencies should not be disturbed, and that they should be protected in their persons and property. We therefore promptly replied that they need have no fears, their property would not be taken. We felt that it was wrong to this commission and to the friendly Indians to take from them their ponies and arms. The wrong was greater in that no inventory of the individual property was preserved, and we understand that the average price of the ponies sold at Laramie did not reach $5 each. This seizure was unjust, and, in view of the facts, cruel to the Indians. There is not wood enough at the agencies for the use of the Indians. In order to procure fuel for their families they are compelled to camp from ten to forty miles from the agency. They must travel this distance once in ten days or two weeks, at the most inclement season of

the year, in order to receive rations. We fear that there will be the greatest suffering, even if some of them do not lose their lives. The least we can do is to repay these friendly Indians honestly for the full value of the property which was taken.

After long and careful examination we have no hesitation in recommending that it is wise to continue the humane policy inaugurated by President Grant. We believe that the facts will prove that under this policy more has been done in the work of civilization than in any period of our history. It has accomplished this one thing, that those who were placed in trust of the national honor did not receive their appointment as a reward for political service.

The great obstacle to its complete success is that no change has been made in the laws for the care of Indians. The Indian is left without the protection of law in person, property, or life. He has no personal rights. He has no redress for wrongs inflicted by lawless violence. He may see his crops destroyed, his wife or child killed. His only redress is personal revenge. There is not a member of either house of Congress who does not know that, even with all the influences of Christian civilization, schools, churches, and social restraints, there is not a community of whites which could protect itself from lawless violence under the same conditions; and yet we take it for granted that the superior virtue of a savage race will enable it to achieve civilization under circumstances which would wreck our own. In the Indian's wild state he has a rude government of chiefs and headmen, which is advisory in its character. When located upon reservations under the charge of a United States agent, this government is destroyed, and we give him nothing in its place.

We would especially call attention to the inadequate laws to punish white men for the sale of intoxicating liquors to the Indians. There is another fearful evil in the unlawful marriages of white men to Indian women. These unions are made after the customs of the Indians, and under their code they are regarded as valid. The law should declare that any Indian woman who thus lives with a white man is his lawful wife, and that the children of such union are legitimate.

The fact that the English government in Canada has expended no money in Indian wars since the American Revolution, has lost no lives by massacre, has had no desolated settlements, and that its Indians are to-day, as they have always been, loyal to the British Crown, is due to the fact

that it has fulfilled its plighted faith, has given to its Indians personal rights of property and the protection of law, and has fostered Christian missions, and has placed over its Indians agents fitted for the task of guiding a savage race to civilization, and who generally hold their office during good behavior.

The greatest difficulty in the administration of Indian affairs is the inadequate salary of an Indian agent. He ought to be a man of ripe experience and of mature age, fitted to superintend the building of houses, the opening of farms, the care of schools, and all those mechanical arts which are necessary for the work of civilization. The agency is usually remote from civilization. The expenses of living are greatly increased. It is impossible for an agent to live with his family on his meager salary. The Department has lost some of its most valuable agents simply because they would not steal, and could not live on $1,500 a year.

Our Indian affairs should be managed by an independent department. It ought to have at its head one of the first men of the nation, whose recommendations would be heeded, and who, as a member of the Cabinet, could confer with the heads of the War and Interior Departments, and devise such wise and just plans as would equally protect the rights of the Indians and of our own citizens. We are painfully impressed with the fact that most of our Indian wars have not only been cruel and unjust to the savage, but have largely grown out of conflicts of jurisdiction between different departments of the Government. The head of the Department of the Interior is already burdened with five distinct bureaus, viz, Pension, Patent, Land, Education, and Indian. He cannot give to Indian affairs that patient attention which is necessary to success. The War Department, as its name indicates, is unsuited for the work of civilization. Officers of the Army are not fitted by inclination or training to teach Indian children to read and write, or Indian men to sow and reap. If by placing this bureau in an independent position we can save the fearful cost of one Indian war, it will be the wisest economy.

In conclusion, your commission respectfully urge that every effort shall be made to secure the ratification and faithful fulfillment of the agreement which we have made by direction of the Government with this hapless people. We entered upon this work with full knowledge that those who had heretofore made treaties with these Indians had seen their promises broken. We accepted the trust as a sol-

emn duty to our country, to the perishing, and to God. The Indians trusted us. There were times when we trembled as we heard their earnest words of confidence and trust. Said a chief who signed this agreement, as he handed a pipe to our chairman, "Give this pipe of peace to the Great Father. When we give and another receives a pipe we regard it the same as when a white man swears on the Bible in court. If they do not speak the truth, evil will happen." We are confident that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs which furnish the darkest page of our history. It is an eternal law of the government of God that whatsoever a nation sows, that and nothing but that shall it reap. If we sow broken faith, injustice, and wrong, we shall reap in the future, as we have reaped in the past, a harvest of sorrow and blood. We are not simply dealing with a poor perishing race; we are dealing with God. We cannot afford to delay longer fulfilling our bounden duty to those from whom we have taken that country, the possession of which has placed us in the forefront of the nations of the earth. We make it our boast that our country is the home of the oppressed of all lands. Dare we forget that there are also those whom we have made homeless, and to whom we are bound to give protection and care?

We are aware that many of our people think that the only solution of the Indian problem is in their extermination. We would remind such persons that there is only One who can exterminate. There are too many graves within our borders over which the grass has hardly grown, for us to forget that God is just. The Indian is a savage, but he is also a man. He is one of the few savage men who clearly recognize the existence of a Great Spirit. He believes in the immortality of the soul. He has a passionate love for his children. He loves his country. He will gladly die for his tribe. Unless we deny all revealed religion, we must admit that he has the right to share in all the benefits of divine revelation. He is capable of civilizaton. Amid all the obstacles, the wrongs, and evils of our Indian policy, there are no missions which show richer rewards. Thousands of this poor race, who were once as poor and degraded as the wild Sioux, are to-day civilized men, living by the cultivation of the soil, and sharing with us in those blessings which give to men home, country, and freedom. There is no reason why these men may not also be led out of darkness to light. If the men of past generations

had reasoned as this generation reasons, none of us would rejoice in the blessings of Christian civilization.

A great crisis has arisen in Indian affairs. The wrongs of the Indians are admitted by all. Thousands of the best men in the land feel keenly the nation's shame. They look to Congress for redress. Unless immediate and appropriate legislation is made for the protection and government of the Indians, they must perish. Our country must forever bear the disgrace and suffer the retribution of its wrong-doing. Our children's children will tell the sad story in hushed tones, and wonder how their fathers dared so to trample on justice and trifle with God.

We herewith submit the agreement made with the Sioux, the speeches made in the several councils, and the letter of Gen. H.H. Sibley.

Very respectfully,

GEO. W. MANYPENNY, *Chairman.*
H.B. WHIPPLE.
H.C. BULIS.
NEWTON EDMUNDS.
J.W. DANIELS.
A.G. BOONE.
A.S. GAYLORD.
SAM'L D. HINMAN,
Official Interpreter.

* * * * *

Remarks of General H. H. Sibley, before the Sioux Indian Commission, at a meeting held at Omaha, Nebr., August 29, 1876.

Mr. CHAIRMAN: With your permission, and that of the other commissioners, I desire to submit a few remarks touching the objects of this commission. A few days since I received a telegraphic dispatch from the Hon. Commissioner of Indian Affairs, stating that the President desired to appoint me a member if I would accept. I replied, thanking the President for the honor proposed to be conferred upon me, but declining on account of ill-health. Three days subsequently I received another dispatch from the Commissioner, stating that my name had been added to the list of commissioners, and urging my acceptance of the position. With every desire to be of service in bringing about an understanding with the Sioux, I felt that I could

do no more than to come to this city, from my home at St. Paul, to attend the first meeting of the commission, and give it the benefit of such counsel as my long acquaintance with the Sioux Indians might enable me to proffer. My good friend Bishop Whipple was very anxious I should be present at this meeting.

Mr. Chairman, I have been acquainted with these Sioux bands for the past forty years. I have hunted with them for months at a time, hundreds of miles away from the nearest white settlements. I was their constant friend in their transactions with the Government, insisting on their rights under existing treaties, and otherwise striving to save them from the fate which had befallen other tribes. In 1850, when I was the delegate in Congress from Minnesota, I made a speech in the House of Representatives advocating the extension of the United States laws over the Indian country, and the establishment of appropriate tribunals to enforce them, and to extend protection to persons and property among the Indians.

When the terrible outbreak of 1862 occurred, involving a great destruction of the white settlers on the frontiers of Minnesota, Iowa, and Dakota Territory, I was placed in command of the forces which, during two campaigns, drove the hostile bands from the country they had occupied, and pursued them to and across the Missouri River. I was afterward, in 1865, as a military officer, detailed as a member of a mixed civil and military commission, Governor Edmunds being also a member, to negotiate treaties with the hostile bands of Sioux on the Upper Missouri, and we succeeded in making treaties with all these bands at Fort Sully. If the provisions of those treaties had been faithfully fulfilled by the Government, there would have been no subsequent wars with these Indians. And if the course I strongly recommended, of enlisting into the service of the United States the choicest and bravest warriors of each of the Sioux bands, as a police force to maintain peace on the frontier, had been adopted—and it could easily have been effected—there would have been an end to hostilities on the border. I had fully proved the feasibility of this course by employing more than a hundred of the warriors who had fought me fiercely in the field, and subsequently surrendered, as scouts to intercept and repel raiding-parties of their own kindred, and they performed that duty efficiently and faithfully, and perfectly guarded the frontier, never hesitating to attack raiders, however superior in

numbers. I yet believe that course to be the true solution of the Indian problem, thereby adding to the Regular Army a force of irregular warriors, well acquainted with the country, and a terror to all refractory tribes.

I trust the commission will leave open the door for such of the warriors with Sitting Bull as were present in his camp when attacked; simply for hunting purposes and with no hostile intent. I have no doubt there were many such who should not be excluded from the benefits of any understanding or agreement made with the friendly bands.

I regret, Mr. Chairman, that my health will not permit me to accompany you to the several agencies, but I trust that the commission will be successful in bringing about arrangements for a general pacification, and I heartily wish the commission God-speed in their errand of mercy.

[Remainder of exhibit omitted in printing]

[Defendant's Exhibit No. 29, Docket No. 74]

44TH CONGRESS, 1st Session. } SENATE. { EX. DOC. No. 52.

LETTER

FROM THE

SECRETARY OF THE INTERIOR,

TRANSMITTING,

In answer to a Senate resolution of April 19, 1876, a copy of the report of the Commissioner of Indian Affairs in relation to the present situation of Indian disturbances in the Sioux reservation.

APRIL 26, 1876.—Referred to the Committee on Indian Affairs and ordered to be printed.

DEPARTMENT OF THE INTERIOR,
Washington, April 25, 1876.

Sir: I have the honor to acknowledge the receipt of the following resolution passed by the Senate April 19, 1876:

"*Resolved*, That the Secretary of the Interior be directed to communicate to the Senate any information in his possession in relation to the present situation of Indian disturbances in the Sioux reservation, or unceded Indian territory of said Sioux, and whether military force has been interposed therein; and, if so, whether at the instance of the Interior Department, and the reasons for such interposition."

In answer to said resolution, I transmit, herewith, copy of report, dated the 22d instant, from the Commissioner of Indian Affairs, together with accompanying copies of papers therein referred to.

I have the honor to be, very respectfully, your obedient servant,

Z. CHANDLER,
Secretary.

The PRESIDENT OF THE SENATE.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
Washington, D.C., April 22, 1876.

Sir: I have the honor to acknowledge the receipt, by reference from the Department, of United States Senate resolution of April 19, 1876, which directs the Secretary of the Interior "to communicate to the Senate any information in his possession in relation to the present situation of Indian disturbances in the Sioux reservation, or unceded territory of said Sioux, and whether military force has been interposed therein, and, if so, whether at the instance of the Interior Department, and the reasons for such interposition."

Assuming that the disturbances alluded to are those arising out of the course pursued for a long time past by lawless Indians under the leadership of the notorious Sioux chief Sitting Bull, in Western Dakota and Eastern Montana, I beg leave to say that this Office has but meager information in regard to the present situation of the troubles with these Indians.

Herewith I transmit a copy of the correspondence on file here, showing the measures adopted by mutual understanding between the War and Interior Departments for inducing, as well as compelling, if need be. Sitting Bull and his followers to go upon their reservation in Dakota and remain there. It will be seen that the insolent and destructive attitude of these Indians rendered the use of military force a necessity. For the maintenance of good order and the protection of the whites, an order had been issued by this Department in December 1875, that these troublesome and defiant Indians should go upon their reservation by the 31st of January last, or they would be regarded as hostile, and so treated by the military. As this order, which had been communicated to them by couriers from several of the Indian agencies, seemed to be utterly disregarded, this Office, taking into consideration the opinion of the General and Lieutenant-General of the Army, that a movement against them would be entirely practicable, and inferring that the force at command would be sufficient to restrain the Sioux Indians now at the several agencies from an outbreak, as a diversion in favor of the hostiles, on the 21st of January, ultimo, in a report to the Department, expressed the conviction that enough had been done to fully commit the Department to the policy of force should the hostile bands further refuse to comply with its order. Acting upon that report, the Department, under date of the 1st of February, ultimo, communicated with the Secretary of War, and turned over these Indians to his Department for appro-

priate action by the Army; and, on the 3d of said month, the Secretary of War replied that the Adjutant-General had directed the General of the Army to take immediate measures to compel the Indians to return to, and remain upon, their reservation.

As to the result of the military expedition against these Indians, this Office has no other information than that furnished in reports from Agents Hastings and Howard, respectively in charge of the Red Cloud and Spotted Tail agencies in Nebraska, and Agent Clapp, of the Crow agency in Montana, all having some bearing upon the subject, and of which copies are herewith submitted.

The resolution of the Senate is herewith returned.

Very respectfully, your obedient servant,

J.Q. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

List of the papers accompanying the foregoing report and referred to therein.

1. Copy of report from E.C. Watkins, United States Indian inspector, to the Commissioner of Indian Affairs, November 9, 1875.

2. Copy of report from Commissioner of Indian Affairs to the Secretary of the Interior, November 27, 1875.

3. Copy of letter from the Secretary of the Interior to the Commissioner of Indian Affairs, December 3, 1875.

4. Copy of letter from Commissioner of Indian Affairs to Agent J.S. Hastings, Red Cloud agency, December 6, 1875.

5. Copy of letter from the Secretary of War to the Secretary of the Interior, and of accompanying papers, January 12, 1876.

6. Copy of letter from the Commissioner of Indian Affairs to the Secretary of the Interior, January 21, 1876.

7. Copy of letter from the Secretary of the Interior to the Secretary of War, February 1, 1876.

8. Copy of letter from the Secretary of War to the Secretary of the Interior, February 3, 1876.

9. Copy of report from Agent D. E. Clapp, Crow agency, to Commissioner of Indian Affairs, March 10, 1876.

10. Copy of report from Agent E.A. Howard, Spotted Tail agency, to Commissioner of Indian Affairs, April 1, 1876.

11. Copy of report from Agent J.S. Hastings, Red Cloud agency, to Commissioner of Indian Affairs, April 3, 1876.

1.

WASHINGTON, D.C., *November 9*, 1875.

SIR: I have the honor to address you in relation to the attitude and condition of certain wild and hostile bands of Sioux Indians in Dakota and Montana, that came under my observation during my recent tour through their country, and what I think should be the policy of the Government toward them.

I refer to Sitting Bull's band and other bands of the Sioux Nation, under chiefs or "head-men" of less note, but no less untamable and hostile. These Indians occupy the center so to speak, and roam over Western Dakota and Eastern Montana, including the rich valleys of the Yellowstone and Powder Rivers, and make war on the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Piegans, Crows, and other friendly tribes on the circumference.

Their country is probably the best hunting-ground in the United States, "a paradise" for Indians, affording game in such variety and abundance that the need of Government supplies is not felt. Perhaps for this reason, they have never accepted aid or been brought under control. They openly set at defiance all law and authority, and boast that the United States authorities are not strong enough to conquer them. The United States troops are held in contempt, and, surrounded by their native mountains, relying on their knowledge of the country and powers of endurance, they laugh at the futile efforts that have thus far been made to subjugate them, and scorn the idea of white civilization.

They are lofty and independent in their attitude and language to Government officials, as well as the whites generally, and claim to be the sovereign rulers of the land. They say they own the wood, the water, the ground, and the air, and that white men live in or pass through their country but by their sufferance.

They are rich in horses and robes, and are thoroughly armed. Nearly every warrior carries a breech-loading gun, a pistol, a bow and quiver of arrows. From their central position they strike to the east, north, and west, steal horses, and plunder from all the surrounding tribes, as well as frontier settlers, and luckless white hunters, or emigrants who are not in sufficient force to resist them, and for-

tunate, indeed, is the man who thus meets them, if, after losing all his worldly possessions, he escapes with his scalp.

And yet these Indians number, all told, but a few hundred warriors, and these are never all together, or under the control of one chief.

In my judgment, one thousand men, under the command of an experienced officer, sent into their country in the winter, when the Indians are nearly always in camp, and at which season of the year they are the most helpless, would be amply sufficient for their capture or punishment.

The Government has done everything that can be done, peacefully to get control of these Indians, or to induce them to respect its authority. Every effort has been made, but all to no purpose. They are still as wild and untamable, as uncivilized and savage, as when Lewis and Clark first passed through their country.

The injurious effects of the repeated attacks made by these bands on the peaceful, friendly tribes heretofore mentioned cannot be overestimated. No people can reasonably be expected to make progress in the arts of peace, if they must be constantly armed, and prepared to defend their houses and property. No Indians can be expected to "civilize," to learn to cultivate the soil, or the mechanic acts, if, while they have the implements of labor in one hand, they must carry the gun in the other for self-defense. Their natural instincts come to the surface at once, and the Indian agent or missionary who is zealously laboring for the advancement of the people under his care, and to carry out the humane policy of our Government, the only policy worthy an enlightened Christian nation, finds his labors vastly increased and discouragements multiplied by this state of affairs.

These wild bands are but as a drop in the bucket in number compared to the great body of Indians who have accepted the peaceful policy, made treaties with the Government, and are keeping them, or have been supplied with provisions, goods, and farming-implements, without treaty stipulations, and are under the care of agents, friendly, and making fair progress in the way of civilization. In interviews with the Indians along the Missouri River and through Montana, during my recent tour of inspection, they invariably spoke of this subject, and complained bitterly that the Government was not protecting them as it had promised, and frequently closed the case by saying "they might just as well go out and kill white men, as to try to be

good Indians, for they get no protection or extra reward for being good." When I told them the Sioux would be punished, they said, "We have heard that before; we'll wait and see." While I am not disposed to be needlessly alarmed, and do not agree with the writers of articles published in numerous territorial papers of a sensational character on this subject, yet I think there is danger of some of the young warriors from friendly tribes falling off and joining with these hostile bands, until, with these accessions, they would be somewhat formidable, and might make a simultaneous attack on the white settlers in some localities, if they are thus allowed to gather head.

The true policy, in my judgment, is to sent troops against them in the winter—the sooner the better—and whip them into subjection. They richly merit the punishment for their incessant warfare on friendly tribes, their continuous thieving, and their numerous murders of white settlers and their families, or white men wherever found unarmed.

The Government owes it, too, to these friendly tribes, in fulfillment of treaty stipulations. It owes it to the agents and employes, whom it has sent to labor among the Indians at remote and almost inaccessible places, beyond the reach of aid, in time to save. It owes it to the frontier settlers, who have, with their families, braved the dangers and hardships incident to pioneer life. It owes it to civilization and the common cause of humanity.

Very respectfully, your obedient servant,

E.C. WATKINS,
United States Indian Inspector.

Hon. E.P. SMITH,
Commissioner of Indian Affairs, Washington, D.C.

2.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
November 27, 1875.

SIR: I have the honor to transmit herewith, inclosed, a special report from E.C. Watkins, United States Indian inspector, dated the 9th instant, in relation to the status and condition of certain wild and lawless bands of Sioux Indians, giving an expression of his views in reference to the future action of the Government toward them.

Inspector Watkins refers to Sitting Bull's band, and others, who roam over Western Dakota and Eastern Mon-

tana, including the rich valley of the Yellowstone and Powder Rivers, and make war on the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Piegans, Crows, and other friendly tribes; and he suggests, for reasons stated by him, that one thousand men, under the command of an experienced officer, be sent into the country of these hostile Indians (numbering but a few hundred) during the winter season, and compel them to submit to the authority of the Government.

I respectfully recommend that this communication be referred to the War Department for consideration and such action as may be deemed best by Lieutenant-General Sheridan, who is personally conversant with the situation on the Upper Missouri, and with the relations of Sitting Bull's band to the other Sioux tribes.

Very respectfully, your obedient servant,

EDW. P. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

3.

DEPARTMENT OF THE INTERIOR,
Washington, December 3, 1875.

SIR: Referring to your communication of the 27th ultimo, relative to the status of certain Sioux Indians residing without the bounds of their reservation, and their continued hostile attitude toward the whites, I have to request that you direct the Indian agents at all the Sioux agencies in Dakota, and at Fort Peck, Montana, to notify said Indians that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile, and treated accordingly by the military force.

Please instruct said agents to acknowledge the receipt of your order, and notify you of the execution of it.

Very respectfully, your obedient servant,

Z. CHANDLER
Secretary

THE COMMISSIONER OF INDIAN AFFAIRS.

4.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
December 6, 1875.

SIR: I am instructed by the honorable Secretary of the Interior, under date of the 3d instant, to direct you to notify Sitting Bull's band, and other wild and lawless bands of Sioux Indians residing without the bounds of their reservation, who roam over Western Dakota and Eastern Montana, including the rich valley of the Yellowstone and Powder Rivers, and make war on the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Piegans, Crows, and other friendly tribes, that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile, and treated accordingly by the military force.

You will acknowledge the receipt of this order, and notify this Office of the execution of it.

Very respectfully, your obedient servant,

EDW. P. SMITH,
Commissioner.

J.S. HASTINGS, Esq.,
United States Indian Agent, Red Cloud Agency, Nebraska.

Letter to the same effect addressed the same day to Agents Howard, Bingham, Burke, Livingstone, Beckwith, Reily, and Alderson.

5.

WAR DEPARTMENT,
Washington City, January 12, 1876.

SIR: Referring to a previous correspondence with your Department on the subject of the appearance of hostile bands of Sioux outside their reservation, I have now the honor to transit copy of a report of the commanding general, Division of the Missouri, concerning these Indians, and to invite your attention to the request of General Sheridan, concurred in by the General of the Army, that should operations against them be determined upon, he may be so advised as speedily as possible.

Very respectfully, your obedient servant,
H.T. CROSBY, *Chief of Clerk.*
(For the Secretary of War, in his absence.)
The Hon. the SECRETARY OF THE INTERIOR.

Indorsements on copy of correspondence concerning status of certain wild bands of Sioux, covering report of Indian Inspector Watkins.

WAR DEPARTMENT, ADJUTANT/GENERAL'S OFFICE,
Washington, December 11, 1875.

Official copies, respectfully referred through headquarters of the Army to commanding general Military Division of the Missouri.
By order of the Secretary of War:
E.D. TOWNSEND,
Adjutant-General.

HEADQUARTERS OF THE ARMY,
Saint Louis, December 13, 1875.
Respectfully referred to Lieutenant-General P. H. Sheridan, commanding Division of the Missouri, for report as to the plausibility of military operations against Sitting Bull and his tribe, this winter.
By Command of General Sheridan:
A. McD. McCOOK,
Colonel and A.D.C.

HEADQUARTERS OF THE ARMY,
Saint Louis, Mo., January 7, 1876.
Respectfully returned to the Secretary of War, inviting attention to General Sheridan's letter, herewith inclosed. Midwinter is the best time to strike hostile Indians in the latitude of the Yellowstone, but we should have timely notice of the object to be accomplished and the means for its attainment.
W.T. SHERMAN, *General.*

[Inclosure to preceding indorsement.]

HEADQUARTERS MILITARY DIVISION OF THE MISSOURI,
Chicago, Illinois, January 4, 1876.
GENERAL: I have the honor to reply to your request as indorsed on certain papers, forwarded from the Secretary

of the Interior, requesting military operations against Sioux Indians, in case they refuse to occupy the reservation assigned them by the Indian Bureau, on or before the 31st day of January, 1876. * * *
As Generals Terry and Crook command the departments in which these hostile Indians are located, I respectfully forward their opinions on the subject.
General Terry is of the opinion that Sitting Bull's band of hostile Indians is encamped at or near the mouth of Little Missouri, and that it can be reached by a quick movement, which may be decisive at this season of the year, and that he has sufficient troops and means to make such a movement.
General Crook is of the opinion that operations can be undertaken in his department against bands of hostile Sioux Indians whenever, in the opinion of the Indian Bureau, such action becomes necessary.
As the commands of these two officers embrace all the Indians against whom military action was contemplated, it will be seen that the movement is considered practicable, and I earnestly request, should operations be determined upon, that directions to that effect be communicated to me as speedily as possible, so that the enemy may be taken at the greatest disadvantage.
Very respectfully, your obedient servant,
P.H. SHERIDAN,
Lieutenant-General.
General W.T. SHERMAN,
Headquarters of the Army, Saint Louis, Mo.

6.

DEPARTMENT OF THE INTERIOR,
OFFICE INDIAN AFFAIRS,
January 21, 1876.

SIR: By Department reference of the 13th instant, I am in receipt of communication from the honorable the Secretary of War, inviting attention to the indorsement of Lieutenant-General Sheridan (therewith inclosed) that, should operations against the hostile bands of Sioux outside their reservation be determined on, the military may be so advised as speedily as possible.
From this indorsement, it appears to be the opinion of the accomplished officers under whose immediate supervision any movement against these Indians would be

conducted—an opinion in which the General and Lieutenant-General of the Army concur—that such a movement at this season of the year is entirely practicable.

I am disposed to believe, also, although the question is not specifically raised by these papers, that the officers whose opinions are thus given have no doubt as to this ability to restrain, with the troops at their command, any possible outbreak (by way of a diversion in favor of Sitting Bull and the Indians who will be the direct objects of the attack) of the bands of Sioux now at the several agencies.

In compliance with your directions, I have the honor to report that the indorsement of Lieutenant-General Sheridan, above mentioned, was called out by a communication from this Office of November 27th last, in which the then Commissioner invited attention to the trouble which Sitting Bull and other lawless Sioux ranging over certain parts of Dakota and Montana were giving to friendly Indians and white settlers within their reach, this communication having been referred by you, in compliance with this recommendation, to the War Department.

Since the date of this communication, viz, on the 6th ultimo, my predecessor, acting under your instructions, directed the agents at the Red Cloud, Spotted Tail, Lower Brulé, Crow Creek, Cheyenne River, Standing Rock, Devil's Lake, and Fort Peck agencies to communicate, if practicable, to Sitting Bull and the other hostile Indians the requirements of the Government that they return within the bounds of their reservation on or before the 31st instant. Agent Howard, of the Spotted Tail agency, reported, under date of the 3d instant, his belief that their demands had by that time reached the northern camps, and that Sitting Bull is fully advised of the intentions of the Government.

Some of the agents named have not been heard from in regard to this matter, while no one has, as yet, clearly expressed a belief concurrent with that of Agent Howard. In my opinion, however, enough has been done to fully commit the Department to the policy of restraining, by force of arms, any further outbreak or insubordination on the part of these defiant and hostile bands, should they refuse to comply before the 31st instant with the demands thus made upon them. Certainly I can conceive of nothing more damaging to the authority of the Government, not

yet fully recognized by other bands of Sioux, than a failure to execute threats of military operations so clearly made.

In further execution of the policy thus determined upon, and with a desire to afford the fullest information to all officers interested, I directed, on the 19th instant, the agents at the Red Cloud, Spotted Tail, Standing Rock, and Cheyenne River agencies, who would in my view be most likely to obtain reliable and early news of Sitting Bull's intentions and movements, to keep me fully advised by letter and telegraph of his acceptance or rejection of the conditions imposed upon him, or of any other intelligence concerning him.

Any information which I may receive in compliance with these instructions will be forwarded without delay to you, for transmission to the honorable the Secretary of War.

The communication of the honorable the Secretary of War is herewith returned.

I have the honor to be, very respectfully, your obedient servant,

J.Q. SMITH,
Commissioner.

The Hon. SECRETARY OF THE INTERIOR.

7.

DEPARTMENT OF THE INTERIOR,
Washington, D.C., February 1, 1876.

SIR: On the 3d December last I had the honor to address a communication to you relative to the hostile Sioux roaming in the Powder River country, under the leadership of Sitting Bull, informing you that I had directed couriers to be sent from each of the Sioux agencies, informing that chief that he must come in with his followers to one of the Sioux agencies, before the 31st ultimo, prepared to remain in peace near the agency, or he would be turned over to the War Department, and the Army be directed to compel him to comply with the orders of this Department.

The time given him in which to return to an agency having expired, and the advices received at the Indian Office being to the effect that Sitting Bull still refuses to comply with the directions of the Commissioner, the said Indians are hereby turned over to the War Department for

such action on the part of the Army as you may deem proper under the circumstances.

I inclose copy of communication from the Commissioner of Indian Affairs, dated the 21st ultimo, recommending that hostilities be commenced.

Very respectfully, your obedient servant,

Z. CHANDLER,
Secretary.

The Hon. SECRETARY OF WAR.

8.

WAR DEPARTMENT,
Washington City, February 3, 1876.

SIR: Acknowledging the receipt of your letter of the 1st instant stating that the time given Sitting Bull and his followers to repair to an agency having expired, and this chief still refuses to comply with the directions of the Commissioner, and turning over the case to the War Department, in accordance with the recommendation of the Indian Bureau that hostilities be commenced against these Indians, I have the honor to inform you that the Adjutant-General has directed the General of the Army to take immediate measures to compel these Indians to return to and remain upon their reservation, as requested by your Department.

Very respectfully, your obedient servant,

W.W. BELKNAP,
Secretary of War.

The Hon. SECRETARY OF THE INTERIOR.

9.

CROW AGENCY, MONTANA,
March 10, 1876.

SIR: I have the honor to inclose herewith a report of murders and outrages committed by Sioux Indians in the valley of the Yellowstone since the first of last July.

It shows seventeen attacks made by them on parties of whites; nine white men killed and ten wounded, besides a large amount of property stolen or destroyed.

I estimate that they interfered with the building of this agency last summer to the amount of four to six thousand dollars. This is not a new condition of things. For several years, the eastern settlements of Montana have been harassed regularly every summer in the same manner. In fact, a regular predatory warfare has been carried on by the Sioux, and by Sioux that are receiving Government supplies.

The party that stole the agency horses and mules last summer left in the corral a blanket with the United States Indian Department brand. The party that attacked the agency train on July 2 and killed José Torjio, left flour-sacks bearing the brand of the United States inspector of Indian Department flour, (Clarkson.)

There is another very important consideration. The Crows have always been fast friends of the whites, and have largely assisted in protecting the eastern settlements of Montana.

The Sioux are now occupying the eastern and best portion of their reservation, and by their constant warfare paralyzing all efforts to induce the Crows to undertake agriculture or other means of self-support.

I respectfully ask attention to the importance of establishing a military post, or at least a summer camp, on the Yellowstone, near the mouth of the Big Horn.

There are fourteen companies stationed in Montana, in the district of which Fort Shaw is the headquarters, most of them at points where no hostile Indians have appeared for a long time. I think it will be evident to every person who is acquainted with the character and topography of the country that if several of these companies were stationed at the mouth of the Big Horn, and the others at Ellis and the forks of the Musselshell, complete protection could be afforded to the settlements, and the notorious Sitting Bull band of Sioux held in check. As it is, not only are men murdered and property destroyed every year, and the permanent good intended to the friendly Crows prevented, but large tracts of the best agricultural and pasture lands of Montana are made uninhabitable.

Very respectfully, your obedient servant,

DEXTER E. CLAPP, *Agent.*

Hon. J.Q. SMITH,
Commissioner of Indian Affairs.

P.S.—I open this to add that four Crows who accompanied General Brisbin's expedition to the mouth of the

Big Horn, and remained behind, have just come in, and report that a very large force of Sioux are moving up the north bank of the Yellowstone. Nearly all the Crows have come in much earlier than usual, and report that they expect the Sioux to attack this agency and themselves in large force. They say they have received word from Fort Peck to that effect.

10.

SPOTTED TAIL AGENCY, NEBRASKA,
April 1, 1876.

SIR: I have the honor to submit this my monthly report of affairs at this agency for March, 1976:

* * * * * * * During the month there was considerable drunkenness among the white and half-breed men, caused by liquor from Camp Sheridan, and I am very apprehensive that serious consequences will follow unless the sale of liquor be stopped.

I am informed that the internal-revenue officer at Cheyenne has issued license to sell liquor to Custer City, Dakota.

I have just read in a Cheyenne paper, "telegram of General George Crook, Fort Reno, March 22, 1876, stating that the village of Crazy Horse was attacked by the troops and destroyed on the 17th, finding it a perfect magazine of ammunition, war-material, and general supplies, and every evidence was found to prove that these Indians are in copartnership with those at the Red Cloud and Spotted Tail agencies, and that the proceeds of their raids upon the settlements had been taken to these agencies and supplies brought out in return." And further: "In this connection I would again urgently recommend the immediate transfer of these agencies to the Missouri."

Now, many unkind remarks find their way into the newspapers, and very few encouraging words for the successful efforts we have made for the civilization of these Indians. They are to-day, and have been for months, one of the best-behaved communities in the country, and that their improvement is not due to military influence is shown in the annual reports and in the reports of the Board of Indian Commissioners of 1875.

I here desire officially to state that very few Northern Indians have been here since the grand council of September last. No proceeds of raids upon settlements have been brought here; no supplies taken north in return. No arms have been sold by the agency trader to Indians for more than two years past, and but little ammunition; and, for two months, none of either.

Very few, if any, of these Indians have been north this season, and I have heard of none who were in copartnership with those of the north.

I respectfully suggest that General Crook be requested to produce some of the abundant evidence which he found.

* * * * * * *

I am, very respectfully, your obedient servant,

E.A. HOWARD,
United States Indian Agent.

Hon. COMMISSIONER INDIAN AFFAIRS,
Washington, D.C.

11.

RED CLOUD AGENCY, NEBRASKA,
April 3, 1876.

SIR: I have the honor to report that I have been on duty here during the month of March, 1876.

The Indians belonging here, who had been north to the buffalo, continued to arrive up to the last of the month. I am of the opinion that there are but few yet to come in; had there been food to issue them on arrival, it would have been some satisfaction, but to find a comparatively empty warehouse and a limited supply of beef, the outlook was certainly discouraging, though they have showed no signs of ugliness. I have succeeded in keeping them in good spirits, and under control, by telling them that every effort was being made by the Department to procure for them more food. The last beef, consisting of about two-thirds of a regular ten days' allowance, was issued March 31.

I learn from one of the half-breed scouts, who was with Crook's expedition against the hostile camp, that it was a complete failure, with the exception of the killing of an old squaw and two children, and the destruction of about forty lodges, with a loss to the troops of four killed and six

wounded. Seven hundred Indian ponies were captured, but were recaptured on the following day, with the exception of about seventy head. A dozen or more officers have been placed in arrest for cowardice, and the command have returned to the railroad.

Sensational newspaper reports from an Army officer correspondent with the expedition, to the effect that the Indians whom they encountered had "mines of ammunition and abundance of supplies, with evidences of having been procured from this and Spotted Tail agency," are very much exaggerated, and, I think, in the most part untrue. Five pounds of powder, twenty of lead, and six boxes of percussion-caps comprised all the ammunition that was found in the abandoned camp. It is generally known throughout this country that the "hostiles" do the principal part of their trading at points on the Missouri River. The agency Indians appear to take but little interest in what has transpired north; but the disastrous result may have a tendency to awaken the old feeling of superiority.

I have experienced no difficulty whatever in taking the census, but have been somewhat delayed on account of the weather. I expect to have it completed in about a week.

Very respectfully, your obedient servant,

JAS. S. HASTINGS,
United States Indian Agent.

Hon. J.Q. SMITH,
Commissioner of Indian Affairs, Washington, D.C.

[Sioux Exhibit F-21, Docket 74-B]

REPORT

OF

THE COMMISSIONER OF INDIAN AFFAIRS.

[For the Year 1874]
[Portions omitted in printing]

THE WILDER TRIBES.

Respecting the Indians enumerated in the first class, this general statement is true: A decided advance has been made during the year in the direction of securing control and influence over these the wildest of the tribes in the country; and the way has opened quite perceptibly for a much larger and more hopeful work among them during the coming year. They are as yet unreached by missionary work, and are in their native paganism, whose superstition often forbids their being counted for enrollment and the attendance of their children at school. It is from Indians in this class that any such hostilities are to be apprehended as hereafter to require the presence or use of the military; and, with the exception of possibly seven thousand to ten thousand, none of these are properly designated hostile; and the hostiles themselves are so scattered and divided in cliques and bands that, except under extraordinary provocation, or in circumstances not at all to be apprehended, it is not probable that as many as 500 Indian warriors will ever again be mustered at one point for a fight; and with the conflicting interests of the different tribes, and the occupation of the intervening country by advancing settlements, such an event as a general Indian war can never occur in the United States. This opinion finds strong confirmation in the fact that the highly disturbed feeling among the Sioux during the past summer has not led to an attempt at war, and that military posts have been successfully established at Red Cloud and Spotted Tail agencies, in face of violent declarations of the Indians that no soldier should ever cross the North Platte. The feeding process, which has been now continued for six years with the Sioux, has so far taken the fight out of them that it

was impossible for a portion of the more warlike non-treaty bands to prevail upon their brethren, who have been sitting down at the agencies along the Missouri River, to risk the loss of their coffee, sugar, and beef in exchange for the hardships and perils of a campaign against soldiers. As a result, the Custer expedition penetrated to the very heart of their wild country and returned without meeting opposition, and the military camps at Red Cloud and Spotted Tail agencies are in safety, though surrounded by a force of fighting men from ten to twenty times larger than their own number. To have tamed this great and war-like nation down to this degree of submission by the issue of rations is in itself a demonstration of what has been often urged—that it is cheaper to feed than to fight wild Indians.

* * * * *

THE SIOUX PROBLEM.

These Indians, comprising seventeen different bands, are the most numerous tribe in the United States. Forty-six thousand seven hundred and fifty-three have received rations from the Government at eleven different agencies. The wilder portions of this tribe, who have as yet consented to visit an agency only on an occasional raid for rations, are variously estimated from five thousand to ten thousand, making the whole number of Sioux not far from 53,000. As a whole, this tribe is as yet unreached by civilization, except so far as their necessities and inclinations have led them to receive rations and annuity goods from the hands of Government agents.

The problem of the future of this tribe is a serious one; not so much on account of numbers or wildness as from the fact that the country they inhabit is not adapted to their support in a civilized mode of life. Undoubtedly a much larger number of white people could maintain themselves by farming and herding in the vast domain assigned to the Sioux, but this is possible only to a people trained to such habits of thrift and industry as would enable them to sustain themselves for one year, or even two, in event of loss of crops by drought or grasshoppers. An Indian farmer must be far along in civilization before he will have become forehanded enough for such an emergency, and it would be scarcely possible for the Sioux to come from barbarism to

this condition in a country where they are liable to such losses two years out of five. It may be said that the Government can come to their aid and carry them over these occasional years of failure; but such help, teaching the Indian to rely on other resources than his own, would be a constant lesson in improvidence, and thus tend to defeat the end in view. The larger portion of the Territory is unsuited to herding on account of the severe winters, which make it necessary to provide hay during several months of the year. Proper care of cattle in such circumstances presupposes a degree of civilization of Indians which would place them above all necessity of Government guardianship. The ponies which the Indians now raise in large numbers, being more hardy than cattle, survive the cold and hunger of a Dakota winter with such support as they get from the grass under the snow, and the bark of the cotton-wood tree. But these ponies, even if a market was found for them, could not be raised in sufficient numbers to furnish a means of support to a people in civilized life.

The Sioux now upon the Missouri River can possibly find suitable soil and wooded country sufficient for as large an experiment of civilization as they can for some years to come be induced to undertake, though not without serious disadvantages. Many of these Indians along the Missouri, as will be seen by the reports of their respective agents, are already beginning in earnest to labor for themselves. The stock cattle furnished at Cheyenne, Crow Creek, and Yankton agencies one year ago have been as well cared for by these Indians as could have been expected, and more are now called for by others at these agencies and at Red Cloud and Spotted Tail. The experiment in this direction at Grand River was not so successful. This process of settling down will gradually extend until the bands along the river are brought into a degree of civilization that will render them no longer hostile or dangerous to neighboring settlers; but it is not at all likely that the country will furnish them with such farms and means of subsistence as to make it unnecessary to provide for a certain portion of their support yearly; and the furnishing of this support will, in itself, retard and in many ways damage the process of civilization.

For the main portion of the Sioux Nation living in Northern Montana, and west of the Missouri River in Dakota, there is not even this degree of hopeful prospect, on account of the barrenness of their country.

THE BLACK HILLS EXPEDITION.

A military reconnoitering expedition to the country in Southwestern Dakota, known as the Black Hills, occasioned great excitement among the whole Sioux people during the summer. They regard it as a palpable infraction of their treaty stipulations, and were filled with the apprehension that it might lead to their exclusion from a country held sacredly their own, and highly prized as their home and last refuge from the encroachment of settlements. The exaggerated accounts of rich mines and agricultural lands given in the dispatches of the commander and explorers and correspondents of the expedition intensified the eagerness of the people all along the border to take possession of this country. Notwithstanding the subsequent correction of these exaggerations by statements on reliable information that no indications of mineral wealth were found, and that the lands were undesirable for white settlements, together with the strict prohibition by the War Department of any intrusion into the Territory, exploring and mining expeditions have been fitted out at Yankton, Bismarck, and other points, and have started to the Black Hills. Some have been driven back by the Indians with loss of life and property, and others are supposed to be on their way. It is not believed, however, that any serious complication will arise from this source. If neither the military nor Indians should be able to guard their country, the explorers themselves will probably soon become satisfied of its undesirableness to them, and will voluntarily relinquish their projects for mining or settlement. It is not improbable, however, that legislation will be sought, meanwhile, by which to procure the opening of this country to settlement. Such a course cannot be too strongly deprecated, and should be opposed in every form. Scarcely a greater evil could come to the Sioux people than the disturbance and demoralization incident to an attempt to dispossess them of their country.

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REPORT OF THE SIOUX COMMISSION.

PHILADELPHIA, *November* 28, 1874.

SIR: The Special Sioux Commission, appointed last February and continued under date of May 4, 1874, beg leave to report that they met at Cheyenne, Wyo., on the 28th of July, all the commissioners being present.

Owing to illness the chairman and Hon. C. C. Cox were obliged to return about ten days after leaving Cheyenne, and most of the business intrusted to the commission necessarily devolved upon the remaining commissioners, Rev. Mr. Hinman and Robert B. Lines, esq. The conclusions at which they arrived in the matter of the charges against the late agent at Whetstone agency, Mr. Risley, and in the matter of the claim of H. Graves for removing Whetstone agency, are stated in their report to the chairman of the commission, which is hereby presented as the report of the commission. Attention is also respectfully drawn to the interesting letter of the Hon. C. C. Cox to the chairman. So far as it insists upon the importance of the establishment among the Sioux of a simple code of law, and its prompt execution at the earliest practicable date, it expresses the mind of the commission as a whole. (Appendix A.)

The commission after much consultation determined not to press upon the Indians the relinquishment of their right to the unceded territory east of the summit of the Big Horn Mountains, partly because the action of Congress at its last session looked only to the cession of their rights in the territory south of their reserve, and partly because the temper of the Indians was such as to make it apparent that an effort to accomplish too much would end in accomplishing nothing.

Much effort was made, however, to secure the relinquishment of the right to roam over the unceded territory north of the North Platte and south of the northern line of Nebraska, and to hunt on the Republican Fork. The commission are glad to be able to report that the Indians connected with the Spotted Tail agency accept the consideration offered by the Government for the surrender of these rights, and agree to relinquish them, only asking that the right be not withdrawn until after this winter, 1874–'75. The commission recommend that $10,000 of the amount voted by Congress for the purchase of the above-mentioned treaty rights be appropriated to the Upper Brulés; that, in accordance with their request, it be paid in American horses and light wagons; that the time of delivery be immediately after the return of their hunting parties from their winter hunt; that the distribution of the horses and wagons be left to the chief, and that, upon their delivery, formal notice be given to the Brulés, that their right to

roam and hunt south of the Niobrara has ceased, and that its use will be prevented by the military.

Equal success did not attend the efforts of the commission to obtain from the Ogallallas the relinquishment of their right to roam and hunt. The commission have felt much difficulty in coming to a decision as to the course which it is proper for the Government to pursue under these circumstances. All things considered, they are of opinion that these Indians have so many conflicting interests and jealousies that it is not probable that they can of themselves arrive at any unanimous decision in the premises; and that the Government should decide for them that a right so injurious to them and its citizens must be relinquished; but that, as Red Cloud claims that promises made his people by other commissions and by Government officers are as yet unfulfilled, a sum of $15,000 additional to that appropriated last year should be appropriated, to be paid him and his people, in the same manner as the previous sum, in presents such as they shall choose, which two sums (or their value in goods) they shall be informed is a full and complete settlement of all claims which they have, or think they have, against the Government, and the payment of which terminates completely their right to hunt or roam south of the Niobrara River. As Spotted Tail makes the same claim as Red Cloud as to unfulfilled promises, an appropriation of $10,000 additional to that voted by Congress at its last session should be made in his behalf.

The chairman dissents from his colleagues in regard to the course here recommended, because he doubts whether "the unfulfilled promises" of which the Indians complain were ever absolutely made, and holding that the Government may fairly demand of Indians who are living on its bounty, and to whom it offers $15,000 as an indication of its generous good-will, that they shall do without further inducement what it deems to be essential to their good and that of its own citizens.

The consolidation of the Red Cloud and Spotted Tail agencies is recommended by the commission for the reasons forcibly stated in the report of the acting chairman to the chairman herewith submitted. (See Appendix B.) The chairman is not prepared to join in this recommendation, chiefly for the reason that he doubts whether an agent is to be had competent to manage so large a number of wild Indians.

The commissioners concur in approving the selection of West Beaver Creek as the site of the new Whetstone agency. For particulars, reference is made to the report of the acting chairman. (Appendix B.) They also concur in thinking that as the southern Arapahoes and Cheyennes are unsettled and at war, and the northern Arapahoes and Cheyennes are unwilling to go to them, and desire to be merged with their friends, the Sioux, it is desirable that the action of Congress in its last appropriation bill, by which the northern Arapahoes and Cheyennes forfeit all appropriations made for their benefit unless they remove south, should be rescinded, and that the agent at the Red Cloud should be instructed to consider the Cheyennes and Arapahoes as part of the Sioux, and to issue their annuities and rations to them without delay.

The Commissioners having completed so far as was possible the business intrusted to them, respectfully ask to be discharged.

Respectfully submitted.

WILLIAM H. HARE,
Chairman.
WILLIAM H. HARE,
S. D. HINDMAN,
C. C. COX,
R. B. LINES,
Commissioners.

Hon. C. DELANO,
Secretary of the Interior.

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[Sioux Exhibit F-22, Docket 74-B]

REPORT

OF

THE COMMISSIONER OF INDIAN AFFAIRS.

[For the Year 1875]

[Portions omitted in printing]

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During the year passing in review there has been less conflict with Indians than for many previous years. With the exception of the Cheyennes and Comanches, who at the close of the period covered by my last report had still refused to surrender to the military, there has been no hostile engagement with the United States troops, and complaint of marauding has been much less than usual. This fact is significant. According to all experience in the management of Indians, this year should have been marked for bloody conflicts. White settlements have been brought nearer to wild Indians than every before; many disturbing questions have arisen, and with the most warlike and powerful of all the tribes there has been a constant series of irritations which in any previous year would have raised the war-cry along a large exposed section of the frontier.

The Sioux have been many times represented as about to go out on the war-path; at other times they have been reported as disaffected by bad management of bad agents and goaded by desperation of hunger and cold to an outbreak. Nothing shows the utter want of truth in all these reports more clearly than the fact that when they were brought cheerfully to relinquish a cherished hunting and roaming privilege they requested that nearly all the $25,000 received in compensation for this relinquishment should be expended in cows, horses, harness, and wagons. Such use of money indicates anything but a hostile intent on the part of the Red Cloud and Spotted Tail Sioux.

It will probably be found necessary to compel the northern non-treaty Sioux, under the leadership of Sitting Bull, who have never yet in any way recognized the United States Government except by snatching rations occasionally at an agency, and such outlaws from the several agencies as have attached themselves to these same hostilities, to cease

marauding and settle down, as the other Sioux have done, at some designated point. This may occasion conflict between this band of Indians and the soldiers. There is also a possibility that the Utes in Northern New Mexico, who are without a home, unsettled and insolent, and transiently fed at Cimarron and Abiquiu, may before long require coercion by force of arms. But neither of these bands can bring three hundred men into the field. I am led not only to repeat with increased confidence the statement made last year that a general Indian war is never to occur in the United States, but also to the opinion that conflict with separate tribes will hereafter be of rare occurrence, and only in the nature of skirmishing.

RELINQUISHMENT OF HUNTING-PRIVILEGE IN NEBRASKA AND KANSAS.

By the treaty of 1868 the Sioux retained for themselves the right to hunt in Nebraska on any lands north of the North Platte and on the Republican Fork of the Smoky Hill River. By act of Congress, March 3, 1874, $25,000 was appropriated for the purchase from the Sioux of the right to hunt in Nebraska. The negotiations for this purchase, undertaken by a special commission in 1874, having failed to obtain the consent of the Indians, were renewed during the visit of the Sioux delegation to Washington in May last, and resulted in an agreement signed by the chiefs and headmen in the presence of their tribe, a copy of which is herewith.

The treaty of 1868 also stipulated that "the country north of the North Platte River, in Nebraska, and east of the summits of the Big Horn Mountains, in Wyoming, should be held and considered unceded Indian territory, and that no white person or persons should be permitted to settle upon or occupy any portion of the same, nor, without the consent of the Indians first had or obtained, should pass through the same."

The distinction between the country assigned for a permanent reserve and that described as neutral territory seems never to have been clear to the Sioux mind; and when the northern boundary-line of Nebraska was surveyed, which by their treaty is made the dividing-line between their permanent reserve and the neutral country, they were surprised and troubled to find it running north of their present agencies and of the country which they have always regarded and intended to retain as their own; and

they demanded that the surveyor's stakes should be taken up and moved south of the Niobrara River. The negotiations for the cession of this neutral country, in addition to that of the hunting-rights, was thus found to be involved in unexpected difficulty. The Indians attached large value to the rights they were surrendering, and declined to accept the sum appropriated by Congress, except upon the condition that the Department would present their claim to Congress for the additional sum of $25,000. This pledge was given to them by the Secretary of the Interior when they entered into the agreement above named, reference to which will show that the attempt to procure the relinquishment of all the neutral country resulted in a compromise, by which the Sioux stipulate for themselves the right of occupation of that portion of Nebraska lying west of the 100th meridian and north of the south divide of the Niobrara River. Good faith with the Indians will therefore make it necessary to lay this matter before Congress and ask for an appropriation in the sum of $25,000.

THE SIOUX PROBLEM.

For a full discussion of the question of the future of the Sioux, attention is respectfully invited to my last annual report, page 6.

It affords me no small gratification to find the observations and conclusions reached at that time upon this subject fully confirmed by the report of the Red Cloud investigating commission, after many weeks spent in the Sioux country in careful inquiry into the condition and prospects of these Indians. The problem for these peolple has not approached a solution during the year, unless it shall be found that the discussion arising from the Black Hills excitement and the investigation at Red Cloud agency have so awakened the public attention to the present necessities and pitiable condition of the Sioux as to lead to immediate, appropriate, and vigorous measures for their relief, by removing the Indians at the Red Cloud and Spotted Tail Agencies to the Missouri River, by driving out the squawmen who infest the Indian country, and by compelling labor as a return for rations. These three essential undertakings will require for success three things: (1) Largely increased appropriations for the Sioux during the next two years, which may thereafter be steadily diminished till they cease altogether; (2) the most efficient and hearty co-operation of

the War Department; (3) in order to afford a suitable location for Red Cloud and his people, the removal of the Poncas from their present reservation, which is a part of their Sioux country, and their consolidation with the Omahas in Nebraska.

Sooner or later these or other radical measures must be adopted, the only alternative being to continue to [illegible]ation and clothe the Indians as idle and insolent vagrants and paupers. I do not believe it possible to subsist the Sioux many years longer upon the appropriations which Congress can be induced to make for feeding purposes only. The whole spirit of our people and of American institutions revolts against any process that tends to pauperism or taxation for the support of idlers. The bringing of these wild Sioux under such wholesome restraint would also be of a material aid to the process of civilization now progressing among other bands of the nation along the Missouri River, upon whom it has as yet been impossible to enforce proper discipline in the requirement of labor for rations, because of the proximity and example of Red Cloud and Spotted Tail agencies.

But the reports of agencies along the river, with the possible exception of Standing Rock, show that it is entirely feasible to civilize the Sioux, provided a suitable country can be found for their occupation and the Government and its agents are capable of continuance in well-doing. At Cheyenne River, bands of Sioux who three years ago were as intractable, as impatient of labor, and in other respects as far from the first steps of civilization as Spotted Tail's immediate followers are to-day, have been induced to erect log houses and open farms to such an extent that the agency is able to report 240 Indian families living in houses, 240 *male* Indians who labor in civilized pursuits with their own hands, and 138 children in school.

The report of the Crow Creek agent, as an account of a first successful year's effort in civilization, is equally encouraging. The reports of the Yankton and Santee Sioux are still more hopeful. Among the latter civilization is an accomplished fact, and if the Yanktons could plant crops with ordinary certainty of a harvest, they would shortly provide their own subsistence. Such progress indicates unmistakably that the difficulty of the Sioux problem does not inhere principally in the Sioux nature, but in the barrenness of their country and the absence of necessary control.

THE BLACK HILLS.

The public excitement mentioned in my last report, occasioned by the discovery of gold in that portion of the Sioux reservation known as the Black Hills country, increased to such a degree in the opening of the spring season as to require action looking toward the purchase of this country from the Sioux proprietors and the opening up of the Big Horn Mountain country for settlement and mining. For this purpose, as well as for completing the negotiation for the relinquishment by the Sioux of their hunting rights in Nebraska and Kansas, a large delegation of this tribe, composed of representatives from those agencies, was brought to Washington in May last for an interview with the President. It was not expected that this interview would conclude the purchase, but that it would prove a preliminary step by which the Sioux tribe would become acquainted with the wishes of the Government and its purposes relative to their own necessities and interests. Accordingly, at the request of the delegation, the President sent a commission, of which Hon. W. B. Allison, of the United States Senate, was made chairman, to negotiate at a general council of the tribe in their own country. The commission has not yet submitted its report, but I am informed that the negotiations have failed on account of a wide disagreement as to the value of the rights to be relinquished by the Sioux. Meanwhile, notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the Hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country. A mining association has been organized, laws and regulations have been adopted for mutual protection, and individual claims staked out, in the right to which they expect hereafter either to be protected by the Government or to protect themselves.

In this serious complication there seems to be but one alternative for the Government: either to so increase the military force and adopt such summary means as will insure a strict observance of the treaty-rights of the Sioux by preventing all intrusion, or to renew the effort of negotiation. However unwilling we may be to confess it, the experience of the past summer proves either the inefficiency of the large military force under the command of such officers as

Generals Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of the country where gold is known to exist by any fear of orders of United States cavalry, or by any consideration of the rights of others.

The occupation and possession of the Black Hills by white men seems now inevitable, but no reason exists for making this inevitability an occasion of wrong or lasting injury to the Sioux. If an Indian can be possessed of rights of country, either natural or acquired, this country belongs for occupation to the Sioux; and if they were an independent, self-supporting people, able to claim that hereafter the United States Government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support; they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty-stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government, granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If, therefore, all attempts at negotiation have failed on the plan of going first to the Indians, I would respectfully recommend that legislation be now sought from Congress, offering a fair and full equivalent for the country lying between the North and South Forks of the Cheyenne River, in Dakota, a portion of which equivalent should be made to take the place of the free rations now granted.

SURVEY OF THE BLACK HILLS—THEIR VALUE TO THE INDIANS

In order to provide for the question of a fair equivalent for this country, by direction of the President, a topographical and geological survey of the Black Hills was ordered, the preliminary report of which, by Walter P. Jenney, mining engineer in charge, will be found herewith. It furnishes many interesting and important facts respecting a region hitherto almost unknown. Professor Jenney and his

assistants are entitled to large credit for the conscientious diligence and thoroughness, which are apparent at every point in their work. The aid rendered by the War Department, by the courtesy of the General of the Army, and by Col. R.I. Dodge, commanding the escort, has been invaluable to the success of the survey. Without such aid, no satisfactory results could have been obtained, on account of the limited funds available for this purpose. The report confirms, in a large degree, the statements of travelers and explorers and the reports of General Custer's military expedition of last year, and shows a gold-field with an area of eight hundred square miles, and around this gold region, principally to the north, an additional area within the Black Hills country of three thousand square miles of arable lands, and this latter embracing along its streams an area equal to two hundred square miles finely adapted to agriculture, while the hill-sides and elevations contiguous thereto are equally adapted to purposes of grazing, making the whole area of three thousand square miles of timber, grazing, and arable land of great value for agricultural purposes.

According to the findings of this report, if there were no gold in this country to attract the white man, and the Indians could be left to undisturbed occupation of the Black Hills, this region, naturally suited to agriculture and herding, is the one of all others within the boundaries of the Sioux reservation best adapted to their immediate and paramount necessities. I doubt whether any land now remaining in the possession of the General Government offers equal advantages; but it will be found impracticable to utilize the country for the Sioux. So long as gold exists in the same region, the agricultural country surrounding the gold-fields will be largely required to support the miners, and to attempt to bring the wild Sioux into proximity to the settlers and miners would be to invite provocations and bloody hostility.

These facts respecting the country which the Sioux seem about to be compelled to surrender, for the sake of promoting the mining and agricultural interests of white men, have an important bearing upon the question of compensation which shall be allowed for their lands; for it must be borne in mind that unless the Sioux Nation becomes extinct, of which there is no probability, the time is close upon them when they must have just such an opportunity for

self-support as that which is now known to be offered in the Black Hills; and if, for the want of another such country, they are obliged to begin civilization under increased disabilities, humanity as well as equity demands that such disability shall be compensated by increased aid from the Government; and to avoid the perils of future legislation, or want of legislation, the compensation should be provided for and fixed at the time when we are taking away their valuable lands.

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REPORT OF GEOLOGICAL SURVEY OF THE BLACK HILLS.

SIR: In compliance with your request for preliminary statements respecting the mineral and agricultural resources of the Black Hills in Dakota, and the work done under any direction during the past summer in exloring and mapping that portion of the Territory, I have the honor to make the following report in brief:

In accordance with instructions received from you and under date of March 27, I fitted out the expedition at Cheyenne, Wyo., and proceeded to Fort Laramie, where I was joined by an escort of six companies of cavalry and two companies of infantry, under command of Col. R.I. Dodge. My party consisted of Henry Newton, assistant geologist; V.T. McGillicuddy, M.D. topographer; Capt. H.P. Tuttle, astronomer, and W.H. Root, head miner, assisted by a number of prospectors, laborers, and practical miners.

The expedition left Fort Laramie May 25, and reached the southern base of the Black Hills June 3, after a march of about one hundred and thirty-five miles, and camped upon the East Fork of the Beaver Creek, when the work of exploring the hills was immediately entered upon and continued unceasingly until the return of the expedition to Fort Laramie, October 13, nearly five months. The Black Hills of Dakota are located between the two forks of the Cheyenne River, and occupy an area included between the 103d and 105th meridians of longitude and the 43d and 45th parallels of latitude. They extend about one hundred miles in a northerly direction, with a breadth of from forty to sixty miles. The 104th meridian, which is the boundary between Wyoming and Dakota, passes through the central portion of the hills, leaving the greater area in the Territory of Dakota.

Without entering into details regarding the manner of working or of incidents in the history of the expedition; how on reaching the hills I found miners prospecting on French Creek; how after a month's work gold was found in paying quantities on Spring and Rapid Creeks; how the miners poured by hundreds into the hills, and accompanying me, gave me great assistance in prospecting the country; I will briefly state such results of the work as will tend to throw light on the probable future value of the region.

That portion of the Black Hills which may be designated as Harney's Peak goldfield is almost wholly in Dakota, and extends about fifty miles north and south, with an average breadth of nearly twenty miles, covering an area of not less than eight hundred square miles. The valuable gold-deposits, however, are found in the valleys of the streams which drain that area, the gold being derived from the disintegration of the quartz-ledges, which are very numerous in the rocks of that region.

The most extensive and valuable deposits of auriferous gravel discovered during the past season were in the valleys of Spring and Rapid Creeks and their tributaries, where, in almost every case, the gravel-bars are very advantageously situated for working, and where many natural circumstances contribute materially to the profitable extracting of the gold which they contain.

Timber of suitable size and quantity for the construction of flumes and sluices is abundant; the water-supply is, in most localities, ample, and the fall of the streams sufficiently great to enable the water to be readily carried above the level of even the more elevated bars and deposits of gravel.

While as yet there have been discovered in the Black Hills no deposits of gravel sufficiently rich in gold to be profitably worked in the primitive manner with pan or rocker, yet there are many bars in the Harney's Peak field, especially upon Spring Creek, the forks of Castle and Rapid Creeks, and the valleys of those mountain streams, which, when skillfully worked by gangs of minors with sluices, will yield a good return for the labor employed and the moderate capital required to be invested. But little could be done in a single season in prospecting the numerous segregated quartz veins of this region, some of which undoubtedly contain gold. I have procured abundant samples for testing their value by assay.

The Bear Lodge gold-field, situated in the extreme northwestern portion of the hills, is wholly in Wyoming, and entirely separated from the Harney Peak region. It does not exceed fifty square miles in area; the gold deposits are small compared with those on Rapid Creek, and are remarkable for the absence of quartz in the gravel, the gold being derived from the disintegrations of feldspar porphry, carrying irregular masses of iron and manganese ore.

It is difficult to determine the agricultural resources or climate of the Black Hills by the observation of a single reason, especially as I could gain but little information respecting the severity of the winters or the prevalence of early and late frosts. The Black Hills rise like an island from an ocean of grass-covered and treeless plains, watered by occasional and scanty supplies of rain; and the winds in passing over these plains gather some moisture which they part with as rain on being chilled by contact with the colder and more elevated region of the central portions of the hills. The result of this is the prevalence of frequent though not heavy rain-falls, giving to the hills a most peculiar climate. There is scarcely a day from May to August without one or two showers, yet owing to the dryness of the atmosphere, the climate was found to be very healthy. During the past season, after August 1, very little rain was experienced, and some of the smaller streams contained water only in pools. That this remarkable rain-fall, in a region where the average fall does not exceed ten inches for the whole year, was not the exhibition of a peculiarly wet season, I can only judge by observation on the growth of the plants and trees.

The abundance of trees and the coarseness of their grain, as well as the growth of plants on dry hill-sides exposed to both sun and wind, tend to show that the season which I witnessed was by no means a very unusual one, though the amount of rain may have been somewhat greater than usual.

The area of land suitable for cultivation is, from the mountainous character of the region, limited as compared with the vast area embraced in the hills, but the soil along the streams and in most of the valleys is deep and fertile, and will be sufficient for the requirements of the population which the hills will support as a stock-raising community. I should judge from the observations which I have had the opportunity to make that at least one-twentieth of the three thousand square miles embraced in the Black Hills may be fairly described as arable lands, and that among these lands

lying near the streams and continuous through the hilly country are large tracts of land forming the slopes of the hill-sides which, while not arable, will afford fine grazing, thus largely enhancing the value of the lands to which they are contiguous.

Among the rocky areas of the Harney's Peak range, and in the northern portion of the hills, there are regions where the grasses are comparatively wanting, but generally throughout the whole area of the hills a luxuriant growth of the finest grasses is to be found, even covering the ground under the shade of the pine trees upon the elevated divides between the streams.

The abundance and fine quality of the grasses and the shelter afforded to stock by the densely timbered slopes and deep valleys will make it a region well adapted to stock-raising purposes.

The timber of the hills is a variety of pine known as yellow or heavy pine; the grain of the wood is straight, rather coarse, splitting readily, and where the trees have escaped the action of fires and violent gales, good straight logs, free from knots, and from 40 to 60 feet in length, and from 12 to 24 inches in diameter, can be obtained in abundance. Spruce of good quality is found among the canons in the interior, and white birch, oak, and elm, of medium size, among the hills on the eastern slope.

The water throughout the hills is excellent in quality, mostly derived from springs among the limestone, or the granite or schistose rock; only in localities among the foot-hills is it contaminated by alkali.

No evidence was found that the Indians ever lived in the hills or ever visited them, except in the spring to cut lodge-poles, or occasionally to stop and hunt deer among the foot-hills while passing from the agencies to the Upper Missouri. The only reason advanced for their not living in the hills is the prevalence of severe thunder-storms and the frequency with which trees are struck by lightning.

In regard to the work done by the survey, I may state that the whole area between the forks of the Cheyenne River, as well as the course of both these streams, has been carefully mapped by the topographer, V.T. McGillycuddy, who has also located the position of the important peaks in the hills and mapped the course of the different mountain ranges and streams. In this work he has been assisted by the astronomer Capt. H.P. Tuttle, who has, wherever practicable, determined the latitude and longitude of more important points. The scientific geology of the hills has been most carefully and thoroughly worked up by the geologist, Mr. Henry Newton; while to myself and the practical miners was alloted the work of prospecting for gold, and determining the mineral resources of the country.

In conclusion I would beg to submit for your consideration the following plan, subject however, to future addition, for a final report of the work accomplished by the expedition.

In addition to the small map which accompanies this report, Dr. McGillycuddy, the topographer, proposes for the final report three maps more complete and accurate namely: a trail-map of the routes traveled by the expedition to, through, and return from the hills; two larger maps of the Black Hills; one *en hachure* for general distribution, and one in contour for illustrating in colors the areas occupied by the different geological formations, and showing the position of the gold-fields.

In order to make the final report as complete as possible, it is proposed to discuss the work of the expedition in the following order:

1st. Historical. To contain brief notices of previous surveys in this region; the origin of the present survey, and the method of exploration pursued.

2d. Topography of the Black Hills; their geographical structure.

3d. Geology.

4th. Mineral resources.

5th. Agriculture.

6th. Special report of the topographer.

7th. Special report of the astronomer, with notes on the meteorology and climatology of the hills.

8th. Zoology.

9th. Botany.

10th. Paleontology.

The work of the survey has been greatly facilitated by the hearty aid given by my assistants in their various departments; by the assistant geologist, Mr. Henry Newton, E.M., in the more particular and detailed geology of the hills; by the unusual and untiring energy of Dr. McGillycuddy, topographer, who, notwithstanding the want of proper assistance and in the face of many difficulties, has succeeded in obtaining material for preparing a most excellent map of the hills; by Capt. H.P. Tuttle, the astronomer, who by severe toil night and day in determining

positions by sextant observations and in laboriously carrying the chronometers during the whole progress of the survey has been enabled to locate seventy places in longitude and more than one hundred in latitude. To Col. R.I. Dodge, the commander of the escort, the thanks of both myself and assistants are due for the uniform kindness and aid in many forms, which have contributed very largely to the success of the expedition. In conclusion, I beg to express to you my thanks for the deep interest which you have manifested in the progress of the expedition, and for the material assistance of your hearty indorsements of its plans and your cooperation in their execution.

Very respectfully submitted.

Your obedient servant,

WALTER P. JENNEY, *E.M.*,
Geologist Exploration of the Black Hills.

WASHINGTON, D.C., *November* 8, 1875.

Hon. E.P. SMITH,
Commissioner of Indian Affairs, Washington, D.C.

RELINQUISHMENT OF THE BLACK HILLS.

REPORT OF THE COMMISSION APPOINTED TO TREAT WITH THE SIOUX INDIANS FOR THE RELINQUISHMENT OF THE BLACK HILLS.

INTERIOR DEPARTMENT,
Washington, D.C.

To the honorable the Secretary of the Interior:

The undersigned commissioners, appointed by your predecessor, under direction of the President, to negotiate with the Sioux Nation with reference to the Black Hills, submit the following report:

On the 18th day of June, 1875, the commission was appointed by the Secretary of the Interior, under the direction of the President, to proceed to the Indian country occupied by the Sioux Nation to hold with said nation a "grand council," with a view to secure to the citizens of the United States the right to mine in the country known as the "Black Hills," and such other rights as could be secured and as might be thought desirable for the Government, having in view the rights of the Indians and the obligations of the United States under existing treaty stipulations.

The following instructions constitute the authority under which the commission acted;

"DEPARTMENT OF THE INTERIOR,
"OFFICE OF INDIAN AFFAIRS,
"Washington, D.C., June 18, 1875.

"GENTLEMEN: You have been appointed by the honorable Secretary of the Interior under the direction of the President, as members of the commission to negotiate with the Sioux Indians relative to the procurement of a cession by them of such portion of that country known as the Black Hills, between the North and South Forks of the Big Cheyenne, as the President may determine to be desirable for the Government to purchase for mining purposes, and a relinquishment of their rights to that portion of Wyoming known as the Big Horn Mountains and lying west of a line running from the point where the Niobrara River crosses the east line of Wyoming to the Tongue River, said line to keep distant on the east not less than fifty miles from each of the forts formerly known as Fetterman, Reno, and Kearney, and also of the necessary right of way through their country to reach the country ceded.

"By reference to the treaty 1868, made with these Indians, sections 2 and 16, copy of which is herewith inclosed, you will be informed as to the nature and extent of the respective claims of the Sioux to these tracts of country. That portion of the Black Hills country which lies within the boundaries of Dakota is, without dispute, a part of their permanent reservation. The country mentioned in Wyoming, as described in the sixteenth section of the treaty above referred to, is a portion of 'unceded territory.' To this the Indians have no claim except for hunting purposes and the exclusion of other people.

"By reference to a map of this country, inclosed herewith, you will observe that the cession of the Black Hills, and the relinquishment of the Big Horn country leaves a considerable tract between these two cessions still within the claim of the Indians, as defined in the sixth section. This region, especially along the Powder River, is known as the Sioux hunting-ground for buffalo, and is intended still to be preserved to them for that purpose, a passage to it being left open on the north of the North Fork of the Cheyenne, as well as on the south of the South Fork.

"The Sioux who are parties to the treaty 1868, by which the rights involved in this negotiation were assured to them, are now found at six different agencies—Santee,

Crow Creek, Cheyenne River, Standing Rock, Red Cloud, and Spotted Tail. They number not far from 35,000. There are also probably not far from 3,000 to 5,000 who roam over the Black Hills country, and to the north and west of it, who have not been enrolled at any agency, and who were only indirectly represented at the making of the treaty of 1868. It is deemed necessary, in order to bring this matter fairly before the large body of Indians interested, that a portion of the commission shall visit them at their respective agencies, and procure such interviews as may be possible with the roaming Indians, and lay definitely before them all the wishes of the Government and their own necessities and interests as involved in the question of the desired cession, and invite the Indians at their agencies to send representative men to a general council, to be held at as early a day as practicable at Fort Sully, on the Missouri River; which general council all the members of the commission are expected to attend.

"In negotiating with these ignorant and almost helpless people you will keep in mind the fact that you represent them and their interests not less than those of the Government and are commissioned to secure the best interests of both parties, so far as practicable. Great care should be taken in your interviews not only to secure proper and exact interpretations of the communications passing between you, but also to satisfy the Indians that their words are fairly conveyed in English. Rev. S. D. Himman, a member of your commission, is entirely competent to give an exact rendering both of the English and of the Sioux. It will be well also in every case to employ the services of such an interpreter as the Indians may select, so as to secure between the services of the two not only exactness but the entire confidence of the Indians.

"In presenting this subject to the Indians they should first of all be assured of the kindly intentions of the President and the Government toward them. They should, if possible, be made to understand that this effort on the part of the Government to procure a portion of their country originated solely in a desire for the continuance of peace between them and the whites; that since the opinion that gold is to be found in the Black Hills has prevailed among the people it has been almost impossible to prevent white persons from entering their country, and that there is no little danger that, spite of all efforts to the contrary, some

evilly-disposed persons will break through the line and that conflict and blood will ensue.

"You will also assure the Indians that it is not the wish of the Government to take from them any of their property or rights without returning a fair equivalent therefor, and that you have come, representing their Great Father, to fix upon an equivalent which shall be just both to them and to the white people.

"You will be careful in your negotiations to keep constantly impressed upon the minds of the Indians that any agreement entered into at the council is to be brought back to the President, and by him to be submitted to Congress for consideration by that body; and that, until the contract has received the approval of Congress, it cannot be binding upon either party.

"Respecting the right of way, this should be left to the discretion of the President, as to the routes to be selected, and as to any restrictions to be imposed upon parties using the routes.

"The attention of the commission is invited to the tenth article of the treaty of 1868, in which provision is made for an appropriation for clothing and other beneficial purposes for the Sioux, for thirty years from the date of the treaty, and also for subsistence of meat and flour, for a period of four years. This latter provision has expired by treaty limitation, leaving the Sioux Nation dependent for the necessaries of life upon the annual charity of Congress. The appropriations for the last few years for this purpose of subsistence vary from $1,200,000 to $1,500,000 annually, and if it should be denied by Congress in any of the annual appropriation bills, these Indians must be left to great hardships, and to hunger verging upon starvation, unless they attempt to supply their wants by marauding among the settlers, which attempt would inevitably lead to a conflict with the military. This difference as to the length of time in which provision is made in their treaty for clothing and subsistence had not been well understood by them until the late visits of the delegations to this city, when they were assured of the facts by the President, and seem so to accept them as such.

"The best interests of these Indians will require that any compensation made to them shall include this provision for subsistence in some form and that in no case should it take the form of cash annuity; but, so far as it shall be possible to gain their consent, shall be left in the discretion of the

President to be used for their comfort and civilization, and the education of their children; and they should agree in accepting this provision to allow their children to be educated. The safest investment of any funds for them will be in United States coupon-bonds.

"The outlook for this tribe is by no means encouraging. They cannot live by the chase; they cannot be supported in idleness by the Government. They must begin at once to learn to live by herding or by agriculture, or both. For this and the education of their children they need help, and whatever expenditure the Government makes in their behalf in the future will be for their benefit just in proportion as the mode of its application corresponds to their actual necessities.

"The commission will make full report of their doings, and the results of their negotiations with the Indians, and submit for the consideration of the Department such recommendations upon the subject treated by them as they may deem best.

"Hon. Wm. B. Allison has been selected as chairman of the commission, and John S. Collins, esq., has been appointed as secretary. Messrs Hinman, Comingo, and Ashby have been requested to undertake the preliminary work of visiting the Indians at their respective agencies, in order to lay the matter of the negotiation before them, and invite them to send delegates to the grand council at Fort Sully.

"You will please hold yourselves in readiness to attend the council at some point on the Missouri River, to be hereinafter designated, which council it is supposed will take place some time late in July.

"Such members of the commission as are under pay in other service of the Government will be entitled to receive their necessary and actual traveling expenses. Other members will receive, in addition to the above, a compensation of $8 per diem while actually on duty.

"Your attention is called to circular letter of the Hon. Second Comptroller, of February 26, 1875, and Department circular of July 19, 1874, for information as to requirements in settling your accounts for expenses.

"Very respectfully, your obedient servant,

"ED. P. SMITH,
"Commissioner.

"Hon. WM. B. ALLISON, *Dubuque, Iowa.*
"Bishop E.R. AMES, *Baltimore, Md.*
"Judge F.W. PALMER, *Chicago, Ill.*

"Brig. Gen. A.H. TERRY, U.S.A. *Saint Paul, Minn.*
"Hon. A. COMINGO, *Independence, Mo.*
"Rev. S.D. HINMAN, *Santee Agency, Neb.*
"G.P. BEAUVAIS, Esq., *Saint Louis, Mo.*
"W.H. ASHBY, Esq., *Beatrice, Neb.*
"A.G. LAWRENCE, Esq., *Rhode Island.*"

Bishop Ames and Hon. F.W. Palmer declined to serve, and Hon. T.O. Howe was substituted, who remained with the commission a few days only, when it became necessary for him to leave for another field of public duty.

In pursuance of instructions, Messrs. Hinman, Comingo, and Ashby, of the commission, visited the various agencies and tribes, and explained to the Indians the object of the grand council, and advised them that it would be held at or in the vicinity of the Red Cloud agency and would convene on the 1st day of September. A report of their proceedings is hereto appended, marked B.

The commission met at Omaha, in the State of Nebraska, on the 26th of August, and after an organization and the transaction of some unimportant business, proceeded directly to the place designated for holding the council, via Cheyenne and Fort Laramie, Wyoming Territory, reaching Red Cloud agency on the 4th day of September.

On arrival at Red Cloud, the commission found that a misunderstanding existed between the tribes as to the place of meeting—chiefly between those located at Red Cloud and Spotted Tail agencies, the former insisting that the council should be held at Red Cloud, the latter that it should be held on Shadron Creek, about twenty-five miles from Red Cloud, and the same distance from Spotted Tail. These differences grew so acrimonious at times as to render it doubtful whether a grand council could be convened.

On the 17th of September, however, a final agreement was reached as to the place of opening the council, the place agreed upon being an open plain about eight miles from the Red Cloud agency, on White River, directly north of Crow Butte.

The intervening time was spent in holding interviews with the chiefs of the various tribes as to the object of the council, and endeavoring to impress upon them the necessity of making an agreement whereby the Black Hills could be occupied for mining purposes, in order that peace might be maintained and mutual good-will promoted.

PROPOSITIONS AGREED UPON.

Before the day appointed for the opening of the council, the commission held frequent meetings for conference as to the character of the proposition to be made to the Indians.

A majority decided that the instructions contemplated chiefly, if not wholly, the acquisition only of the mining rights and such other rights as are incidental and necessary thereto, and that it would be better for the Government, and surely so for the Indians, to make an agreement upon this basis, especially so as it seemed clear to the majority that the Indians would not make absolute sale upon any terms that would be acceptable to the commission and that it would be inconvenient to secure the signatures of three-fourths of the adult male Indians to an agreement of sale; that being necessary under the twelfth article of the treaty of 1868.

A minority, however, entertained opinions decidedly adverse to these views, and maintained that the absolute title could be secured as easily and cheaply as the mining right and that in the end it would become necessary to divest the Indians of all title to the hills, but yielded, so far as to allow the proposition to be presented in the first instance in the form proposed by the majority; and, accordingly, the chairman was instructed to place the question before the Indians in that form.

OPENING OF THE GRAND COUNCIL.

The grand council opened on September 20, at the place designated.

The following members of the commission were present: W.B. Allison, chairman; A.H. Terry, A. Comingo, S.D. Hinman, G.P. Bauvais, W.H. Ashby, and A.G. Lawrence.

Of the Sioux Nation, representative men were present from the following tribes: Brules, Ogalallas, Minneconjous, Uncpapas, Blackfeet, Two-Kettle band, Sans Arcs, Lower Brules, Yanktons, Santees and Northern Cheyennes, and Arapahoes.

The chairman, by order of the commission, opened the council with a brief statement of the objects and wishes of the Government, as follows:

REMARKS OF THE CHAIRMAN.

"We have now to ask you if you are willing to give our people the right to mine in the Black Hills, as long as gold or other valuable metals are found, for a fair and just sum. If you are so willing, we will make a bargain with you for this right. When the gold or other valuable minerals are taken away, the country will again be yours to dispose of in any manner you may wish. If you will sell to us this right, we suggest as the proper eastern boundary the point where the North and South Cheyenne come together, and that we take for mining uses all the country lying between the rivers thus uniting, as far west as the 104th meridian of longitude west of Greenwich, which will be about the line of the high limestone ridge in the western part of the Hills. We suggest these rivers as the north and south boundaries because they are easily known to you and to us. The great object we have in making this agreement is to secure a lasting peace with you. It will be hard for our Government to keep the whites out of the Hills. To try to do so will give you and our Government great trouble, because the whites that may wish to go there are very numerous. If you give us the rights we ask we will give you in return a fair equivalent, and in such a way as to do you good and improve your condition. We do not wish to take from you any right or property you have without making a fair return for it. We are asked by our Great Father, and it is our own wish, to consider the interests of both parties as far as we can. We know that you are in need of aid from us. You have received liberal sums from us in the last few years, and we fear they have not been of as much service to you as they should have been. Whatever we agree to give you now we will try and so arrange that it will all be expended in such manner as to put you in the way of helping yourselves, rather than that you should rely upon others, and place you in a condition by which you may in the future live, or try to live, as the white men.

"There is another country lying far toward the setting sun, over which you roam and hunt, and which territory is yet unceded, extending to the summit of the Big Horn Mountains. We do not know what value you place upon this country. We would like to secure your interest in a part of it, and if you are willing to sell we would like so much of it as lies west of a line beginning nearly west of where we now stand, namely, at the northwest corner of the State of

Nebraska, and running in a northwesterly direction until it touches the Yellowstone River at the 107th meridian. It does not seem to be of very great value or use to you, and our people think they would like to have the portion of it I have described.

"We want you to consider this well, also. First consider whether you wish to part with it, and if you do, what you want us to pay for it, and let us know, and then if we can agree as to price we will buy of you."

DIFFICULTIES AT THE OUTSET.

After this statement the Indians asked time to consult. It became apparent to the commission at an early period of the negotiations that the Indians would demand an exorbitant sum for the Hills. Nearly all having intercourse with them or influence over them made exaggerated statements to them of the value of the Hills, and it was a source of regret that the Indian agent at Spotted Tail and Dr. Daniels and other officers and employés of the Government, who had frequent communication and considerable influence over many of the Indians, felt it to be their duty to express opinions that the Hills were of great value for mining and agricultural purposes, and that the Government ought to pay from thirty to fifty millions of dollars for them. These opinions thus expressed, and differing so widely from the views of the commission, had the effect to excite hopes in the Indian mind which made it exceedingly doubtful in the beginning whether any agreement could be reached. These influences were in the main exerted to either secure an exorbitant price or compel a failure to make any agreement, and they were so patent at the agency that unless the commission would agree to a sum ranging from thirty to fifty millions, no agreement would or could be reached.

The Indians seemed to be divided into two parties, the larger willing to part with the Hills if a large price could be obtained; a smaller portion, more resolute, because composed chiefly of the young men were opposed to parting with the Hills for any consideration whatever. These differences delayed a second meeting until the 23d, at which time no conclusion had been reached by them, and the tribes were all in bad spirit on that day, which most likely would have resulted in a serious outbreak but for the wise precaution taken by a few of the leading chiefs, especially by

Young Man Afraid Of His Horses and his soldier band. Although all were present on the 23d, the council was not convened. No proposition was made by the Indians nor did any chief address the commission. All separated, after some consultation held by the leading chiefs among themselves, without fixing any time for future meeting. It was plain, from the proceedings of that day, that no agreement could be made; yet the members of the commission were anxious to continue their efforts at least long enough to secure an open and public expression of the views of the Indians.

The commission sent for some twenty of the leading chiefs to visit them at the agency and, in emphatic words, endeavored to impress upon them the importance of coming to some agreement among themselves. At this interview, which was held on the 26th, they agreed to meet the commission on the following day in council, and on the 27th the council again convened. In the mean time several of the chiefs and tribes had left for their homes, so that at this and subsequent meetings no more than one-half of those present on the 20th and 23d appeared.

THE DEMANDS OF THE INDIANS.

On the 27th, 28th, and 29th, the commission listened to propositions from the leading chiefs of the various tribes, which were a mixture of complaints and demands, the latter of so extraordinary a character as to make it manifest that it was useless to continue the negotiations. We quote from most of these speeches to show the character and extent of these requirements.

RED DOG. We want to be taken care of for seven generations ahead.

RED CLOUD. There have been six nations raised, and I am the seventh, and I want seven generations ahead to be fed.

RED DOG. We want to get pay for seven generations ahead, the same subsistence that you have been giving us. All our chiefs are here. They want to get back pay from what our Great Father has promised us, in horses and light wagons and six yokes of oxen. They have surveyed the lands all around us, right by Running Water. We wish that our Great Father would move the line down to the Platte. Our Great Father asked for the Black Hills, and our head chiefs said, "We don't want to give the whole Hills; we will

just give where there is gold, in the center, not to include the pine; just the Black Hills." We don't want to have any more roads through the country to run over us here. The road they have made through the village, where the thieves came through, they may travel that. There are words I want to say for the half-breeds and those who are married to the Indians.

LITTLE BEAR. Our Great Father has a house full of money. Suppose a man walks right into that house and takes the money, do you suppose that would suit everybody? The Black Hills are the house of gold for our Indians. We watch it to get rich. For the last four years the Great Father's men are working at that hill, and I want our Great Father to remember that and not to forget it.

LONE HORN. Seven years.

LITTLE BEAR. If a man owns anything, of course he wants to make something out of it to get rich on. You gentlemen were sent from our Great Father's house—you are looking for something good, of course, and we are the same, and we are glad to speak to you. We would like to have you look after what has been taken out of the Black Hills. They have asked about buying them. You gentlemen came from there to see what has been said, and I am going to tell you what I think about it, and I want you to report it to your Great Father. There will be persons like myself, Indians, on the earth as long as they live. I want you to feed them, and give them rations every year, and annuities. We want to be helped and to be helped right and taken care of. The councilmen are here. Go and tell the Great Father what I have said, and come back and tell me. From this on we want our Great Father to help us; give us a great deal more than we get now. What we get does not go around. After this, when our Great Father sends us annuity-goods we would like to get a list of them, so that one of our own men can look over it. Tell this to the Great Father. When you help me to all that I will think over what you ask me.

SPOTTED TAIL. As long as we live on this earth we will expect pay. We want to leave the amount with the President at interest forever. By doing that I think it will be so that I can live. I want to live on the interest of my money. The amount must be so large that the interest will support us. Part of this each year I can trade for something to eat. I will trade part of it for enough annuity-goods to go around. I will trade some of it for stock to raise cattle. I will trade

some of it for hogs. I will trade some of it for mares, to raise horses. We want some good cattle every year. I want some ammunition too—powder and lead. Every year we want some guns. If the Great Father does this while I live then I will get pay for the land. We want some clothes as long as any Indians live; if even only two remain, as long as they live they will want to be fed, just as they are now as long as they live they want tobacco and knives. Until the land falls to pieces we want these things; when it does we will give it up. There is no use for the troops here now, and we want them removed.

SPOTTED BEAR. Our Great Father has a big safe, and so have we. This hill is our safe. That is the reason we can't come to a conclusion very quick. Before our Great Father does anything for us, these people go and steal from us, and I want that made good. As long as we live I want our Great Father to furnish us with blankets and things that we live upon. We want seventy millions of dollars for the Black Hills. Put the money away some place at interest so we can buy live stock. That is the way the white people live.

RED CLOUD. My Great Father has told me that there have been six generations back of Indian tribes, and I am the seventh. These hills out here to the northwest we look upon as the head chief of the land. My intention was that my children should depend on these hills for the future. I hoped that we should live that way always hereafter. That was my intention. I sit here under the treaty which was to extend for thirty years. I want to put the money that we get for the Black Hills at interest among the whites, to buy with the interest wagons and cattle. We have much small game yet that we can depend on for the future, only I want the Great Father to buy guns and ammunition with the interest so we can shoot the game. For seven generations to come I want our Great Father to give us Texan steers for our meat. I want the Government to issue for me hereafter, flour and coffee, and sugar and tea, and bacon, the very best kind, and cracked corn and beans, and rice and dried apples, and saleratus and tobacco, and soap and salt, and pepper, for the old people. I want a wagon, a light wagon with a span of horses, and six yoke of working cattle for my people. I want a sow and a boar, and a cow and bull, and a sheep and a ram, and a hen and a cock, for each family. I am an Indian, but you try to make a white man out of me. I want some white men's houses at this agency to be built for the Indians. I have been into white people's

houses, and I have seen nice black bedsteads and chairs, and I want that kind of furniture given to my people. I thought I had some interest in this sawmill here, but I find I have not. I want the Great Father to furnish me a sawmill which I may call my own. I want a mower and a scythe for my people. Maybe you white people think that I ask too much from the Government, but I think those hills extend clear to the sky—maybe they go above the sky, and that is the reason I ask for so much. I think the Black Hills are worth more than all the wild beasts and all the tame beasts in the possession of the white people. I know it well, and you can see it plain enough that God Almightly placed those hills there for my wealth, but now you want to take them from me and make me poor, so I ask so much so that I won't be poor. Now I will tell you how much of the country I give you. Around the hills is a race-track, (trail,) and I sell to the Government inside of that trail.

BLACK COAL (Arapahoe.) I say for my part that we want our rations and annuities, and the Government to help us for seven generations to come. Our Great Father's boys have destroyed all our game on which we depend for a living, and I want our Great Father to pay for it in beef and other provisions, so that we can depend on it hereafter for a living. I have a right to payment for the Black Hills as well as the Ogalallas.

LITTLE WOLF, (Cheyenne.) You are here to try to buy the gold regions in those Black Hills. There has been a great deal stolen from those hills already. I want to speak to you in regard to this country that I have lost. My people own an interest in these hills that you men speak of buying; after this my people want to be fed by the Government for the next seven generations. We want guns and ammunition in return for this portion of land that the Great Father has asked for. If the Great Father gets this country from us, it is a rich country and we want something to pay us for it. We want to be made rich too. There is gold and silver and a great many kinds of mineral in that country. The Great Father gets that for the whites. They will live on it and become rich. We want him to make us rich also.

FAST BEAR. The beef-cattle that the Great Father has issued to me, no doubt each steer has been weighed twice and called two, and some of them have been put away somewhere else, and I wish the Great Father would track them up. It seems that all this back pay is due me and some of it has been lost and I didn't know it, and I wish that it

would all be tracked up and put in with this payment for the Black Hills. This land that you want to buy is not a small thing. It is very valuable and therefore I am going to put a big price on it. I am in the center of the Sioux tribes, and we must all have an equal payment. I want to put some of the money from this land that we let you have at interest in our Great Father's hands. With the interest I want to buy some stock and hogs and good tame cows, and mares. I don't mean to have these paid out of the annuities, but from the back pay. Hereafter our Great Father should give us rations. I want the Government to give us rations and annuities, more than we have now, and ammunition and guns for the Black Hills. I want you to give us the same as in the treaty of 1852, whatever has been issued to us—even little tin pails, &c. Of course it is not a very small thing that you ask of me, and therefore I ask to be supported as long as I live, and as long as my children and their children live. Now for the Black Hills. I will tell you the portion we want to give you. There are two rivers, one on each side; we don't want to give you the land to the rivers, but only the lands in the Black Hills as far as the pine goes. There must be only one road from the Missouri to the Black Hills. One of my head men was caught in the Black Hills and scared a little last summer. I want the Government to pay him for that road.

Mr. ALLISON. What road?

FAST BEAR. That thieves' road. (Custer's trail.)

STABBER. Now, beware, and be lively, and don't be discouraged, and try and give as many millions as we have asked for those hills. We know that those hills will support us for seven generations to come, and I have said it plainly more than once. I have said that you white people are rich, and I want of the Great Father guns and provisions and live stock issued to us on which we may depend for seven generations to come, or as long as we live.

DEAD EYES. You have put all our heads together and covered them with a blanket. That hill there is our wealth, but you have been asking it from us. It is not a very small thing, you must remember; therefore, at our Great Father's house, we asked for a great deal, but it is not very much when we will ask equal shares. You white people, have all come in our reservation and helped yourselves to our property, and you are not satisfied; you went beyond to take the whole of our safe. These tribes here all spoke with one word in saying that they look after their children for seven gen-

erations to come, and I think it is right. These people have asked you to remove the surveyor's line a little back, and give us a little wider track. They mean it when they say it. If it is done we will live happily and peaceably.

CROW FEATHER. You, my Indian friends, of course, all who have an interest in this land have a right to step up and speak for themselves. I never call anybody our Great Father but God. I have heard there is another Great Father down here, and I am going to call him our Great Father. A man has a right to speak as he pleases, and ask what he wants for his own land. Now, our people say that the Great Father shall grant our wishes. You all remember that, boys. You white people have brought word from the Great Father. You have brought tidings, and it is not a very small thing. It seems as though you take the head from my shoulders; that is just the way that I feel. Of course our Great Father don't keep his safe in his house for thieves to go in the door and take his money out. We all know that. Our Great Father has asked me to give up the heart of this land where I was born and raised, and the heart of this land is big and good, and I have camped all around it and watched and looked after it. Our people here speak of seven generations to come. Now, remember, I hope that our Great Father will not be so stingy with his money as not to grant that. We wish our Great Father to feed people of my color hereafter as long as the race lasts. We want from our money different kinds of live stock such as the white people have. We want clothes for the Indian race as long as it lasts. Even if our Great Father should give a hundred different kind of live stock to each Indian house every year, it seems that that would not pay for the Black Hills. I was not born and raised on this soil for fun. No, indeed. When our Great Father asked for this land I thought it pretty hard. Now there are thirty two annuities that the Government has promised us. I hope that that won't be included in his annuity for the Black Hills. I hope our Great Father will look and see how many millions of dollars have been stolen out of the Black Hills, and when he finds it out, I want the Great Father to pay us that, different from the Black Hills annuity.

FLYING BIRD. There is gold all over this hill out here which our people own. You can see it with your naked eyes. What our people ask for the Black Hills, the amount that we ask from our Great Father, will grow small year by year, and the Black Hills will grow richer. As long as our

Indian race lasts we hope that our Great Father will not forget us. That he will clothe them as long as they live, and feed them and furnish them with live stock. From this treaty on, every time the Government delivers an annuity to our agents, we shall choose a half-breed who lives among us. The chiefs must take this last and give it to the man, for we well know that there are many rats between here and the Great Father's door. But if our Great Father only knew he would go on and drown them out, and find many ratheads all the way.

At the meeting on the 28th, Spotted Tail asked the commissioners to state in writing what sum they were willing to pay for the hills, and the manner of payment. On the 29th the commissioners submitted a final proposition in writing to the Indians, as requested by them the day previous.

THE FINAL PROPOSITION.

The people of the United States, desiring to live in perpetual peace and unity with those of the Sioux Nation, and desiring to deal with them in all things liberally, fairly, and justly and to contribute as far as may be to their civilization and comfort, do, through their commissioners, duly appointed and authorized, submit to said nation the following propositions assuring them that it is their privilege to accept any one or reject all of them:

I. To purchase the license to mine, and also as incidental thereto the right to grow stock, and to cultivate the soil in the country known as the Black Hills, and bounded and described as follows, to wit: Beginning at the junction of the North and South Forks of the Cheyenne River, and embracing all the territory between said rivers lying west of said junction to the one hundred and fourth meridian of longitude west from Greenwich, the United States agreeing to pay therefor the sum of $400,000 per annum; the United States reserving the right to terminate said license at any time by giving two year's notice by proclamation and payment of the full amount stipulated for the time the license may continue and at the expiration of said term, all private property remaining upon said territory shall revert to the Sioux Nation; and such an amount of said $400,000 as the Congress shall determine, not less than $100,000 annually, shall be expended for objects beneficial for the civilization, and the remainder of said annual sum shall in like manner

be expended for their subsistence; or, if the Sioux Nation prefers it,

II. To purchase the Black Hills as above described, from the Sioux Nation, and to pay them for their interest therein the sum of $6,000,000 in fifteen equal annual installments the said sums to be annually appropriated for their subsistence and civilization, not less than $100,000 of which shall be annually expended for purposes of civilization.

III. That the President of the United States shall, under proper restrictions and regulations, designate three routes to the Black Hills country, as follows, to wit: One from the south, between the one hundred and second and one hundred and third meridians; one from the east, not farther north than latitude 43½°, until it reaches the one hundred and second meridian, and one from the west, not north of latitude 44°; also a branch road from some point on the Niobrara River to intersect either the eastern or southern route, at some convenient point not west of the one hundred and third meridian west of Greenwich.

IV. The commissioners furthermore propose to purchase all that portion of what is known as the Big Horn country in Wyoming, which lies west of a line drawn as follows, to wit: Beginning at the northwest corner of the State of Nebraska, and running in a northwesterly direction until it reaches the Yellowstone River, where the one hundred and seventh meridian west of Greenwich crossed said river; and to pay the Indians for their interest therein the sum of $50,000 annually for ten years, to be paid in good American cows and other live stock, and in such implements of husbandry as are convenient to stock-growing and as may be deemed advisable by the President.

V. Any agreement which may be made shall be of no binding force upon either party until it shall have been submitted and agreed to by Congress and approved by the President of the United States; and any agreement for the purchase of the Black Hills country shall be of no effect until it shall be so agreed to and approved, and until it shall be signed in accordance with the provisions of the twelfth article of the treaty of 1868.

VI. The commissioners propose that, in case of the acceptance by the Sioux Nation of the above propositions, and after the proposed agreement shall have been completed, as above set forth, a reasonable sum shall be expended in presents to be distributed as is customary among the Indian people.

The Indians refused to consider the question of cession of that portion of Wyoming known as the "Big Horn country" on the ground that it was valuable to the wild tribes and bands who roam over it, and that they would not consent to surrender it at present. Finding the Indians opposed to any negotiation for the sale of the "Big Horn country," this branch of the subject was not pressed upon them, although it would be a very desirable acquisition.

The proposition, so far as the Black Hills are concerned, was presented in the alternative. The commission then had serious doubts whether there was gold in the hills in sufficient quantity to make mining profitable, but were willing to make their proposition most liberal in order to give opportunity of testing their value. It will be observed that $300,000 of the annual payment was to be used for subsistence, in case of purchase, for fifteen years, and, in case of acquisition of mining right only, for a period of two years after notice to the Indians and to the miners, and $100,000 each year was to be used for purposes of civilization, to teach the Indians how to take care of themselves and to provide them with the means.

The commission all agree that a much larger sum than $300,000 annually will be required for several years to subsist these Indians, regardless of what may be our future treatment of them. Under existing treaty-stipulations we are not required to make any appropriation for this purpose, yet Congress in the last two years has thus appropriated about $2,400,000. The appropriations have been made on the theory that either starvation or a border war would result if the appropriations were not made.

THE COST OF THE SIOUX.

To test the accuracy of this view relating to probable future expenditures, the commission submit the facts as they appear in the history of this Sioux Nation for the last six years under the present policy and under the treaty of 1868.

For the last six years, including the present fiscal year, the Government of the United States has appropriated for the support of the Sioux Nation, under the treaty of 1868 and in addition to the obligations of that treaty, the following sums:

For the fiscal year 1870–'71----------	$1,867,376.00

For the fiscal year 1871–'72	1,917,500.00
For the fiscal year 1872–'73	1,919,300.00
For the fiscal year 1873–'74	2,437,640.49
For the fiscal year 1874–'75	2,002,500.00
For the fiscal year 1875–'76	1,719,300.00
Or, for six years, the sum of	12,863,616.49

This does not include any probable deficiency that may appear at the end of the present fiscal year, which will probably amount to a considerable sum if the estimate made by the agent at Red Cloud, at the request of and for the commission, even approximates a correct statement. His estimate is as follows:

AGENT SAVILLE'S ESTIMATE.

Estimate of supplies for the Ogallalia, Sioux, Northern Cheyenne, and Arrapahoe Indians for the year ending June 30, 1876, 13,500 persons, being 4,927,500 rations.

Articles.	Pounds.	Estimate for Sioux, 1,000 persons, 365,000 rations.	Estimate for Northern Cheyennes and Arrapahoes, 3,500 persons, 1,277,500, rations.	Total estimate for Sioux, Northern Cheyennes, and Arapahoes.	Total received for Sioux, Northern Cheyennes, and Arapahoes.	Price.	Cost of amount estimated.	Cost of amount received.
		Pounds.	*Pounds.*	*Pounds.*	*Pounds.*		*Dollars.*	*Dollars.*
Beef	300	10,950,000	3,832,500	14,782,500	9,000,000	2.46½	364,388.62½	221,850.00
Flour	35	1,277,500	447,125	1,724,625	500,000	4.30	74,158.87½	14,400.00
Corn	35	1,277,500	447,125	1,724,625	880,000	3.50	60,361.87½	30,800.00
Beans	5	182,500	63,875	246,375	60,135	3.28	8,081.10	1,972.43
Sugar	8	292,000	102,200	394,200	150,044	8.94	35,241.48	13,413.07
Coffee	4	146,000	51,100	197,100	74,612	21.37	42,120.27	15.944.58
Bacon	14¾	520,000	187,366	707,366	200,000	14.90	105,397.53	29,800.00
Salt	1	36,500	12,775	49,275	.....	.....	.....	.....
Soap	1	36,500	12,775	49,275	11,000	66-10	3,252.15	726.00
Tobacco	½	18,250	6,387	24,637	7,700	.55	13,550.35	4,235.00
Tea	.....	.....	.....	.....	6,000	.30	.....	1,800.00
						.....	726,552.25	334,941.94

The above estimate is based upon the largest number of Indians visiting the agency.

It was reduced in my corrected estimates about one-fourth in amount for those who would be absent from the agency during part of the year hunting.

The rapid destruction of the game, however, has caused a larger number than usual to remain at the agency, so that the reduction of twenty-five per cent of the estimate will leave the supply small.

The amount allowed is less than half of the estimated requirement. An examination of the estimates and the amount allowed will show that the supplies of all rations will be exhausted by the last of February, or, at latest, the middle of March.

After the present year the full amount of the estimate will be required at this agency as undoubtedly the full number of Indians estimated will reside at this agency, unless a Black Hills agency is formed, which will reduce the number of Sioux at this agency to about seven thousand.

J.J. SAVILLE,
United States Indian Agent.

These appropriations have all been expended except those for the current fiscal year. Of this aggregate sum, $2,400,000, appropriated for the last and current fiscal year for subsistence, is outside of the treaty of 1868, and appropriated solely on the ground of charity and humanity.

From all the evidence derived from agents, employés, and the Indians themselves, the commission is of opinion that the annual value of all the products secured by a cultivation of the soil by the Indians at the several agencies would not exceed $5,000 per annum for the last six years. In this estimate we do not include the products of the Santees or the Yauktons, neither of which tribes resides on the Sioux reservation. And the commission is of opinion that, if the present policy is continued, the results of the next six years will not differ materially from those of the last. Indeed, the commission very much doubts whether enough has been raised in the aggregate to re-imburse the annual appropriations made for the salaries and expenses of the farmers employed by the Government at the various agencies.

The commission cannot state what effort, if any, has been made to place the Indians to work at the various agencies, other than that found in the published reports; nor can they speak intelligently of the possibilities, with proper effort, at any of the agencies except Red Cloud and Spotted Tail, but from published statements and the most reliable data accessible it is very doubtful whether any considerable portion of the reservation, although containing 2,500,000 acreas, is suited to agriculture, although a very large portion could be made available for grazing, if the Indians could be made to care for stock in this rigorous climate during the winter.

There are at Red Cloud and Spotted Tail at least twenty thousand Indians now subsisted and cared for by the

United States. Our observation leads us to the conclusion that the character of this region is such that farming operations are impracticable, even when conducted by those familiar with the best methods. Small tracts could be made productive by means of expensive irrigation, but the volume of water is not sufficient to irrigate on an extensive scale, even if the country were suitable. Grazing to a limited extent might be made remunerative. An impediment, however, in the way of grazing, even, arises from the fact that both these agencies are located in the State of Nebraska, outside of the reservation set apart by the treaty of 1868. A short distance to the north are the *Mauvaises Terres*, or Bad Lands, extending through the reservation in a northwest direction from the Missouri River to the western boundary, and fifty miles in width most of the distance. A short distance south are the Laramie and Platte Valleys, both in Nebraska, occupied by the whites for grazing purposes; thus leaving for the use and occupation of the Indians a narrow belt of country on the White River, unless they cross the Bad Lands north, (which is not practicable,) or unless they encroach upon the lands south, occupied by the whites, which, if done, would lead to serious trouble with citizens of the State of Nebraska. So that it does not seem practicable for them to sustain themselves by grazing or farming where they now are, even if they manifested a disposition to work, which they do not.

THE PRESENT PROBLEM.

For the reasons just stated, and for others equally obvious to any who will visit their country, but not within our province to discuss, no progress whatever has been made toward civilization or self-support at either of these agencies, or among the tribes receiving their rations and annuities at these agencies, during the last six years, unless we should call progress that dependence which makes the Indian rely upon the Government rather than the chase, or labor for the necessaries of life. During these six years, whatever of food, clothing, or shelter they have had, has been provided by appropriations from the national Treasury, and the Indians have done absolutely nothing but eat, drink, smoke, and sleep, except indulging each day in the healthful exercise of horseback riding, (each Indian having at least one pony,) and at intervals, for diversion, engage in

a hunt to the north or south. They regard labor as disreputable and disgraceful, unless performed by the women of the tribes, who do the necessary drudgery. It occurs to the commission that so large an annual expenditure of public money, with so feeble results, is expensive and unremunerative to the United States and to the Indians. As long as the present methods continue, very large annual expenditures will be required, but not so large as heretofore, if better methods for issuing supplies should be adopted.

The commission do not charge that any frauds have been commitled by any one, as they have no knowledge of any, and made no investigation; but they are quite sure that the opportunities for fraud are easy and frequent. But under any possible method, large expenditures must be continued for a time, unless they are left to starve or prey upon the settlements along the border for subsistence. They can no longer live by the chase, and it will require much persevering and well-directed effort for some years and a change of location to lead them up to a position where they will be self-supporting. This expense will continue to increase with the growth of the tribes in numbers, and all the reports of enumeration show that they are increasing in numbers.

THE NUMBER OF THE SIOUX.

Hon. Peter B. Porter, Secretary of War in 1829, estimated the Sioux tribes at 15,000 from the best data then attainable.

Nile's Register of date of September 29, 1829, contains an extract from the private journal of a gentleman who resided three years on the St. Peter's River, who fixes the total number of Sioux, including the Sissetons and Tetons, at 40,000; 21,000 of these are Tetons, and are not included in the present estimates of the Sioux nor in the report of Secretary Porter. In 1836 the Sioux were estimated in the report of Secretary of War at 23,991; and in 1850 at 26,000, including all Sioux in Dakota and Minnesota. In 1862 the Commissioner of Indian Affairs estimated the Sioux of Dakota at 13,000. The present estimate of the Commissioner of Indian Affairs, report of 1874, fixes the number of the various tribes of the Sioux at 41,704, of which 35,143 are in Dakota, and 35,455 are entitled to the benefits of the treaty of 1868, which shows a large increase over the number re-

ported in 1800 and 1862. The later reports of the Indian Office greatly vary in their estimates of the actual number. It is probable that the data from all these sources are inaccurate, but enough is seen to show that the Sioux tribes are increasing in numbers. A provision should be made and enforced for a complete and accurate census. The national census of 1870 was taken under the law of 1850, which makes no provision for the enumeration of Indians not taxed, so that the estimates then made are derived from the Indian Office, which fixed the total number of Indians in Dakota at 27,520. Enough, however, is ascertained from these sources to justify us in maintaining that the Sioux tribes are increasing in numbers. In confirmation of this view we call attention to the statistics and views carefully prepared by General A. G. Lawrence, of the commission, and appended hereto, and marked A. These considerations led the commission to agree to a much larger sum than they believed the bills to be worth. This offer, regarded by the commission as ample and liberal, met with derisive laughter from the Indians assembled, as being inadequate.

THE CONFERENCE ENDED.

The conference ended on the 29th September without any result being reached. On the evening of that day the commission was waited upon by Spotted Tail and other leading chiefs, who requested that the President should call to Washington two or three prominent chiefs from each band for purposes of further negotiation, and the commission assured them that they would make known their wish to the President by calling attention to the fact in any report they would make. The commission, however, desires to state that in its judgment, no good would result from such a conference. The Indians, in their present temper, would not agree to any terms that ought to be proposed by the Government, and if they did, any such agreement would not receive the sanction of three-fourths of the tribe. Either the treaty of 1868 must be disregarded, or any agreement looking to the purchase of the Hills must receive the assent of three-fourths of all the male members of the Sioux Nation, under the twelfth section of the treaty, which is as follows:

"No treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force as against the said

Indians, unless executed and signed by at least three-fourths of all of the adult male Indians occupying and interested in the same. And no cession of the tribe shall be understood or construe in such manner as to deprive, without his consent, any individual member of any tribe of his rights to any tract of land selected by him, as provided in article six of this treaty."

THE PROBLEM CONSIDERED.

We do not believe their temper or spirit can or will be changed until they are made to feel the power as well as the magnanimity of the Government; and inasmuch as Congress is required by existing law to approve of any agreement made before it is binding on either party, the commission are unanimously of the opinion that Congress should take the initative and by law settle for itself what shall be done upon the whole subject, and then notify the Sioux Nation of its conclusion. If they assent to the terms proposed, let them be carried out by the Government; if they do not consent, the Government should withhold all supplies not required by the treaty of 1868. If the Government will interpose its power and authority, they are not in condition to resist. This authority should be exercised mildly but firmly, and should be directed mainly to provisions looking to the ultimate civilization of the Indians. They never can be civilized except by the mild exercise, at least, of force in the beginning. This generation of them will not voluntarily sustain themselves, and the Government has only before it the alternative of perpetually supporting them as idlers and vagabonds, or using such power as may be necessary to enforce education in English, in manual labor, and other industrial pursuits upon the youths of the tribes, male and female, thus preparing the coming generation to support itself and finally to become citizens of the United States. Also, such power and authority as will compel the existing generation to make an effort to become self-supporting by agricultural or other labor.

THE PROVISIONS OF THE TREATY OF 1868

The treaty of 1868 contemplated these results within a brief time, and provided, as was then supposed, ample means to accomplish them.

Article 7 provides for the education of all children between the age of six and sixteen years. This article has not

been enforced either at Spotted Tail or Red Cloud, in any sense and scarcely noticed at any of the remaining agencies.

The ninth article provides for the delivery to each person who shall begin farming one good American cow and one good, well-broken pair of American oxen, and in addition, for a period of thirty years, twenty dollars annually.

The sixth article provides that any head of a family may hold in severalty 320 acres of land, and any person over eighteen years of age, not the head of a family, 80 acres.

The eighth article provides for $100 in value of seeds and farm-implements for the first year, and $25 annually for the same purpose for three years more.

The tenth article provides for one good substantial suit of woolen clothing for each male over fourteen years each year for thirty years, and for each female over twelve one suit annually for thirty years, and material for one suit each year for all under these ages for a period of thirty years. Assuming the average annual cost for clothing to be $10, and to number thirty thousand, this item alone will cost $300,000 per annum for thirty years from the date of the treaty. This article further provides food for a period of four years, provided the Indians could not furnish their own subsistence at an earlier date.

This important treaty of 1868 contemplated, among other things, that the Sioux Nation should establish itself on a permanent reservation; that it would be required by labor to support its own members after a period of four years, except that clothing was provided for thirty years; and to induce the Indians to become self-supporting, the Government agreed.

First. To set apart for each head of a family in severalty 320 acres of land, and each person not the head of a family 80 acres.

Second. For the first year seeds and farm implements to the value of $100, and $200 for three years more.

Third. One good American cow, and one pair of well-broken American oxen.

Fourth. Twenty dollars annually for thirty years for each person engaged in farming.

Fifth. One substantial suit of clothes for each member of every family for thirty years.

Sixth. Schools, teachers, physicians, blacksmiths, farmers, &c.

These are the bounteous provisions of the treaty of 1868, applied to every family of every tribe in the Sioux Nation,

and which contemplated that at the end of four years, if not earlier, the nation would be able to provide its own subsistence.

Nearly seven years have passed away and these Indians are no nearer a condition of self-support than they were when the treaty was signed: and in the mean time the Government has expended nearly $13,000,000 for their support. So that the future treatment of the Sioux becomes a matter of serious moment, if viewed from no higher stand-point than that of an economic question.

WHAT SHALL BE DONE?

The purchase, lease, or occupation of the Black Hills by the whites is a mere incident to the great question, what shall be done with the Sioux people? It is said, "As long as we feed them we will not be required to fight them." If this alternative is presented now, it will be fifty years hence if we continue to furnish them subsistence and take no steps to improve their condition, as we surely have not in the last six years. And if their numbers are increasing, as we believe, the amount to be annually expended will increase in like ratio. The commission is therefore of the opinion that Congress should act upon the whole question, and devise a policy especially applicable to the Sioux Nation, within the spirit and letter of the treaty of 1868. This treaty contains two leading ideas, and was intended to secure two purposes, namely, the education of the rising generation, and the self-support of all the tribes. The former was made compulsory by the seventh article of the treaty, and nearly all of the remaining provisions, so far as the Indian is concerned, were intended to accomplish the latter by holding out to him inducements supposed to be ample to secure easy and rapid compliance. That this was intended and expected, is clear from the fact that the treaty only provided subsistence for four years at most. Congress can, under the letter of the treaty, provide most stringent laws for the education of those between 6 and 16.

The Government is pledged by the treaty to provide schools and teachers, and the Indians agrees and "pledge themselves to compel their children, male and female, between the ages of six and sixteen years to attend school." The obligation is mutual and the power ample. Surely, if England and the German states, Hungary and Denmark,

and the most enlightened of American States, think it worth while to enact stringent laws to enforce the attendance of the youths at the common schools, our Government, when it has the power, should, by stringent laws faithfully enforced, make the experiment which it is pledged to make by the treaty of 1868. The common school, in the several States of the Union, is supported by taxation of property. Iowa taxes her people $4,000,000 annually, and Massachusetts, with about the same population, $6,000,000 annually, to support free schools. The State of New York has expended in the last twelve years for public-school purposes $116,000,000 raised by taxation.

EDUCATION AND LABOR.

These enormous sums are levied upon the property of the people, on the theory that universal education is essential to the welfare of the State. These Indians are within the territorial limits of the United States, and subject to their authority, and cannot be removed out of that jurisdiction. Education to them is essential if they are to be reclaimed from semi-barbarism, and it concerns the whole people of the United States. We now supply all the children of the Sioux Nation, between the ages of six and sixteen years, with food and clothing, and with better food than is enjoyed by a very large portion of the laborers of the country, and expend as much, per capita, for clothing, as is expended by many of our laborers, so that the only additional expense in educating them would be the employment of competent teachers, and the necessary expense of buildings for school purposes. These schools ought to be established at points not accessible to the adult Indians, for instruction in the elementary branches of English as usually taught in our primary schools, and should also embrace instruction in the ruder employments, such as are taught in manual-labor schools for boys and industrial schools for girls. It might be difficult to separate the younger children from their parents, and an attempt so to do might meet with serious opposition, so that at first those in charge should select, with the consent of parents, the brightest and most promising youths for such schools, and in the mean time other schools of like character, with stringent rules for their government, should be established in the neighborhood of the agencies, but wholly separated from them. In this way the Indians

would very soon realize the benefits to be derived, and further separation would be less difficult.

This experiment of separation was successfully tried by the Choctaw Nation in 1825, and subsequent years. A school was established in Kentucky, known as the Choctaw Academy, and was under the direction of Col. Richard M. Johnson, located at Blue Springs P P. Ritchlyn, a well-educated Choctaw, says, in a letter to the Hon. James Barbour, Secretary of War:

"I approve of the measure because I was educated in the bosom of our white brethren in Tennessee, and I know how to appreciate its inestimable blessings arising from an education among them. It is my decided opinion that promising youths of our nation should be educated in this method, leaving the mass of our population to the honorable and benevolent exertions of the missionaries who are settled among us; for we acknowledge with gratitude their pious and benevolent labors, and nothing is intended to depreciate their merits."

Nile's Register of November 4, 1826, noting the progress of this school, says:

"The Choctaw Academy of Kentucky is in a flourishing state. The second examination of the pupils lately took place in the presence of 500 people, and the boys acquitted themselves much to the satisfaction of all present."

Again, in July 1827, it says:

"There are at date at this establishment about 100 boys from the tribes of the Choctaw, Creeks, &c., a part of whom have attended more than twelve months, and have made very considerable progress."

The present advanced state of civilization among the Choctaws and Creeks may be traced to efforts like those pursued a half century ago. It is vain to expect that such schools will be attended unless attendance is made compulsory by law, and enforced rigorously. If the Government will earnestly enter upon an experiment of this character, making the necessary additional appropriations therefor, philanthropic people will be ready to second the work, either with money or effort, or both. Even now considerable sums are expended by the various missionary societies for schools, doing good here and there, but of little service in civilizing a whole tribe or nation. It may be said if this policy shall be adopted for the Sioux it should be for all other tribes as well. The answer is that the burden is enforced upon us by the treaty of 1868, so far as the Sioux are

concerned, and no other treaty imposes a like burden. There are from 2,000 to 2,500 children about the Red Cloud agency and no school has been established there, or any attempt made to have one. There are 2,000 in the neighborhood of Spotted Tail agency, and no effort worthy of that name has been made at this agency to establish a school. At the Cheyenne River agency there are probably from 1,000 to 1,500 children, and a missionary school, with an average attendance of 20.

The Commissioner of Education estimates that there are 10,217,825 children in the United States between the ages of six and sixteen years, or about one-fourth of the whole population. Assuming that about the same ratio prevails in the Sioux tribes, there are now on the Sioux reservation 8,000 children who are growing up in barbarism, not 200 of whom have ever received any instruction whatever; and these children are not decreasing in numbers. An actual count of the Indians at Yakton agency was made in 1859, report of which is found in Indian Report of that year. This count shows, men 440; women, 632; boys, 473; girls 427, and about 150 absent; which shows the ratio of children to be not less than above estimated. If this condition is to continue, how long will the people of the United States be taxed to support the Sioux Nation? If the Government shall enter upon the work in earnest, these labor-schools could be established in a mild climate and productive country, and could soon be made self-sustaining; but the power of force, mildly exercised, must be invoked in the beginning. To rely upon voluntary attendance is futile. This has been tried for two hundred years, and has rarely been a success among the wilder tribes of Indians. This experiment may not be, but should be attempted gradually, and upon a well-matured plan prepared by eminent teachers. It may be said that this experiment will make large drafts upon the Treasury. This need not be so. As stated before, these children are now clothed and subsisted; or, rather, money is expended to clothe and subsist them. All above twelve years of age could, if well directed, very soon be made to earn their own subsistence and enough to supply food to all attending school, and in time do very much toward providing their own clothing. The latter, if successful, would relieve the Government from clothing them for thirty years, as required by the treaty. Besides, the experiment could be tried in such a gradual way as that, if failure should follow, it need not be pursued. Or, if it shall prove too expensive, it

could at any time be abandoned by Congress. This method is suggested for consideration. If a better can be found, it should be adopted. It seems to the commission that education, as here suggested, or by some effectual method, is the first step toward the civilization of these tribes. Religious missionaries or sectarian schools, are useful as adjuncts, or may follow; but a complete system of education, embracing all the children, is the first requisite. Some comprehensive system of education for the Sioux Nation should be established, or all attempts to educate and civilize them might as well be abandoned.

The remaining element in the treaty, as already stated, contemplated that these tribes should become self-supporting at the end of four years. Seven years have elapsed, and they are no nearer self-support now than then. How can they support themselves? Frond says: "I know but three ways of living— by working, by begging, and by stealing." The two last cannot apply to a whole tribe or nation; therefore, for them there is but one way, namely, by working. They comprehend fully that they can no longer live by hunting; the game and the buffalo are rapidly disappearing from their reservation, so that they cannot now subsist by the chase. To avoid self-support, they ask the Government, as a consideration for the Hills, that they shall be subsisted and clothed for seven generations, and some of them insist that this should continue as long as any of the tribe remains. They are averse to labor, and will not work voluntarily. Shall we require them to labor, and enforce the requirement? The American idea is that "to force a man to labor against his will is to make him a slave." An attempt in this direction can be justified only on that which has been called the tyrant's plea—necessity. Does this necessity exist, or does the public good require it? Our Government does not hesitate when the public safety, or, in other words, the general good requires, to compel citizens to serve in the Army. During our recent conflict, a most stringent conscription law was enacted and enforced, because the Government needed soldiers. Vagrant laws are enforced in most of the States as necessary for the good of the State.

Francis A. Walker, late Commissioner of Indian Affairs, who has studied the Indian question with great care, clearly expresses the necessity of exercising governmental control in the following paragraph, which we quote and approve. He says:

"A rigid reformatory control should be exercised by the Government over the lives and manners of the Indians of the several tribes, particularly in the direction of requiring them to learn and practice the arts of industry, at least until one generation shall have been fairly started on a course of self-improvement. Merely to disarm the savages and to surround them by forces which it is impossible for them to resist, leaving it to their own choice how miserably they will live, or how much they shall be allowed to escape work, is to render it highly probable that the great majority of the now roving Indians will fall hopelessly into a condition of pauperism and petty crime. The right of the Government to exact in this particular all that the good of the Indian and the good of the general community may require is not to be questioned. The same supreme law of the public safety which to-day governs the condition of 80,000 paupers and 40,000 criminals within the States of the Union affords ample authority and justification for the most extreme and decided measures which may be adjudged necessary to save this race from itself, and the country from the intolerable burden of pauperism and crime which the race, if left to itself, will certainly inflict upon a score of future States.

The United States may, within the treaty of 1868, refuse to issue subsistence to any or all of the tribes of the Sioux; and, therefore, if supplies are issued, the Government can affix conditions, such as they shall be issued only in compensation for labor performed or for services rendered; and, in the judgment of the commission, after the expiration of the present fiscal year, all rations should be issued only in consideration of services performed. Congress should enact such laws, and the Interior Department should establish such regulations, as will make the requirement effective. There is nothing in the treaty of 1868 inconsistent with a provision for such laws and regulations, and the spirit of the treaty and the necessities of the case require it. It is worse than folly to suppose that the Indians will labor unless instigated thereto by the method here indicated, and it cannot be expected that the people of the United States will, without protest, long consent to be taxed to support the whole Sioux Nation without some equivalent, and they ought not be required so to do. It needs no argument to show that the condition of the Indian will be improved by exacting from him labor in return for charity, if he is able to render it. His tribal relation does not exempt him from labor if the public necessity and his own support require it.

It has been maintained that all obligations of the Government and the Indians have been merged into the treaty of 1868, and that all our relations to each other are fixed by that treaty. We do not so regard this treaty.

THE WAY CLEAR FOR ACTION.

The seventh article of the treaty provides that this treaty shall have the effect and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements *"obligate the United States to furnish and provide money, clothing, or other articles or property to such Indians and bands of Indians, as become parties to this treaty, but no further."* So that for all other purposes, so far as the Indians are concerned, prior treaties are still in force.

By the several treaties of 1868, made with the bands of the Sioux, (all but the Brulés, of which Spotted Tail is the chief,) the following provision is assented to and made prominent, namely: "Said Indians hereby acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States; so that by treaty stipulation the Sioux Nation, with the exception of a single tribe, cannot complain of such laws and regulations as will make them self-supporting. But if there were no treaty-stipulations as quoted, it is well settled by the decision of the Supreme Court of the United States that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and that Congress may pass laws for their government, and this may be done in cases where there are no treaty-stipulations prohibiting such laws. The treaty of 1868 is silent on this subject, and therefore whatever laws and regulations may be required to accomplish the purpose indicated may be rightfully provided without conflicting with existing treaty-stipulations. Any system looking to the civilization of these tribes on their present reservation will be difficult, because of the small amount of contiguous arable land. Hence, if it were practicable, it would be best for the Sioux to wholly abandon their present reservation, and go to the Indian Territory, where the lands are more productive and subsistence cheaper, and where they could much more quickly and easily become self-supporting by agricultural pursuits. But they look upon the Indian Territory as "the graveyard of their race," and

could not at present be made to leave their present reservation without the use of military force, and probably, if at any time this should become practicable, it could only be done by inducing particular tribes—those most advanced—to go there, and in course of time the whole nation might be induced to follow. We have until recently treated the Indian tribes as domestic independent nations, with whom we could make treaties. The commission of 1868, which negotiated the treaty under consideration, strongly urged an abandonment of this policy, and a Congress, 3d of March, 1871 did abandon it, and embarked in a new policy; that "no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired (Revised Statutes, sec. 2079, page 366.)

OUR OBLIGATIONS TO EXCLUDE UNAUTHORIZED PERSONS.

Whatever our obligations may be under the treaty of 1868, it is the declared policy of Congress that they shall be fulfilled, and the faith of the nation is pledged to their fulfillment. The second article of the treaty provides that a reservation described therein "shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and the United States now solemnly agrees that no person, except those herein designated and authorized so to do, and except such officers, agents, and employés of the Government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, *shall ever be permitted to pass over, settle upon, or reside in the territory described in this article.*" So that, until this treaty is abrogated by the authority of the United States, it is the duty of the Government to see that this "solemn promise" is enforced. When we remember that the exterior boundaries of the reservation cover an extent of over twelve hundred miles, we can realize the magnitude of this promise, especially when for nearly four hundred miles the eastern boundary is the Missouri River, and the south and west an open plain, so that

roads are not necessary to enable persons to enter upon the reservation. The Black Hills are nearly in the center of the reservation from north to south, and easily accessible from all sides, except, perhaps, the north. The measure of force to be employed by the United States in enforcing this article of the treaty depends upon the good faith of the Sioux Nation with reference to their obligations. The obligations of the treaty are mutual and reciprocal. The Indians at the post have not so acted as to require the utmost vigilance on the part of the United States. They promised to maintain peace and order on the reservation. A failure to keep this promise would entail a heavy expenditure on the part of the Government, yet they have so conducted themselves, while receiving the bounty of the Government, as to make the establishment of expensive military posts necessary at all the agencies. At Red Cloud there are four companies of infantry and two of cavalry; at Spotted Tail, three of infantry and one of cavalry; a post at Fort Laramie, contiguous to the reservation; and a small force at each of the other agencies; all made necessary by the conduct of the Indians, and all requiring great expense for their maintenance except those on the Missouri River, on account of the distance from cheap transportation. Now, they ask that the Government shall use this military force, not only to preserve order and protect property at the agencies, but also that it shall be used against citizens of the United States who choose to violate law and treaty-obligations, and who, in addition, take the risks of conflict with the Indians for the shadowy prospect of gold in the Black Hills.

Although the treaty requires the Indians to be removed to a place designated on the Missouri River, or a place contiguous to it, a large portion of them (the larger part) have refused, and now refuse, to make their permanent home in the reservation set apart for them, and say they will only be removed by military force.

Before the Sioux Nation is in position to exact so much of the Government, it should relieve the Government of the necessity to force to protest its own agents and property, purchased for the use of the Indians with money voluntarily appropriated from the public Treasury, and should comply with the provision that requires them to move to a designated place upon their reservation. They insist that the value of the Hills shall be estimated at many millions because of the gold easily acquired, but they refuse to become self-supporting by making effort to acquire it. Their leading

chiefs ask $70,000,000 for the Hills in the morning and in the evening beg a shirt or a blanket! Such a mixture of assurance, poverty, and idleness would not ordinarily command the highest sympathy, or seem to require the utmost vigilance, on the part of the Government or the people to preserve rights under a treaty which is only sacred to the Indian so far as it conforms to his whims, caprices, or interests.

The President of the United States could do no less than to use the military forces of the United States to maintain this provision. But, in view of all the circumstances and conduct of the Indians, Congress ought to consider the whole question, and by law declare the policy that should be pursued in the future, preserving its own obligations, and insisting that the Indians shall reciprocally observe them. When a firm policy is established by law, comprehending our whole relations to the Sioux Nation, it will not be difficult to make a just agreement upon the subject of the occupation of the Hills. The Indians are now treated as wards of the Government in every other respect except as to the lands. The treaty of 1868 contemplates such treatment. The Indians are now subjects of our bounty and charity, and we can impose upon them conditions for their improvement as we will. They are sure to be resisted at first, but will be assented to gladly in time, as it is impossible for them to resort to hunting as an alternative, so that dependence upon the Government or self-support by labor or starvation are the alternatives.

CAUSES OF FAILURE.

The commission, in closing, state that a failure to make an agreement may be traced to the following causes:

1. That no agreement can be successfully concluded in the Indian country by means of a grand council of chiefs in the presence of the great body of the Indians.

2. No agreement can be made unless accompanied with presents, as presents have invariably been distributed heretofore at the signing of treaties or agreements.

3d. The Indians place upon the hills a value far beyond any sum that could possibly be considered by the Government.

4th. The Indians are hostile to the presence of whites on the reservation, and they believe that the opening of the hills to the whites would result in the opening of the whole reservation and their final expulsion, which belief induces a strong minority at least to oppose any cession.

5th. The determination on the part of persons not Indians but having great influence over them, that no negotiation shall be successful that does not involve a large sum annually for many years, and in case of present failure another commission would be sent, which would deal liberally with them.

THE SUMMING UP.

The commission recommend:

1st. That Congress shall take the initiative upon the whole subject of our relations with the Sioux, and by law make provision for a thorough system of education for all between the ages of six and sixteen years at a point or points distant from contact with or from the influence of adult Indians, which system shall involve manual-labor and industrial schools, and shall be compulsory; also provide by law and regulation that the adult Indians shall be required to perform labor as a condition for their subsistence, and that after a time in the future to be fixed subsistence shall only be issued to such as do labor, and to the aged, infirm and those who are unable to labor.

2d. Protect by law every Indian in the acquisition of private property, and secure him in the possession of the same.

3d. That those bands which now occupy the northwestern part of the State of Nebraska be removed therefrom to some point or points within the permanent reservation established by the treaty of 1808, where land suitable for agriculture can be found and where necessary supplies can be furnished at a greatly reduced cost.

4th. That all supplies be issued under the direct supervision of officers of the Army, and that detailed reports of quality and quantity and cost be published annually.

5th. Abolish all the present agencies and re-organize the whole system of officers and agencies for the Sioux Nation, and provide such compensation to officers and agents as will command, if not secure, fidelity and competency.

6th. Make known to the Indians that a sufficient amount of force will be used to secure compliance with these salut-

ary provisions made for their benefit, to the end that they may become civilized and self-supporting, if possible.

7th. Provide for payment to the Indians of a sum which Congress shall fix a equivalent for the Hills, taking into the account all the circumstances surrounding them, and the value of the Hills to the United States; which sum, so offered or paid, shall become a part of the fund required for the purpose hereinbefore indicated.

The plan here suggested, or some other to be adopted by Congress, should be presented to the Indians as a finality, and with it they should be told that its rejection will have the effect to arrest all appropriations for their subsistence in the future, and all supplies not absolutely required by the treaty of 1868.

The commission makes these suggestions with hesitation, the more so because it will require patience and time to make the experiment a success, if it becomes so. The commission has felt it to be its duty to state the facts as they appear, and has ventured to suggest remedies, imperfect though they may prove to be, in order that those more familiar with the whole subject may combat them, and suggest others more efficacious, if these should not stand the test of intelligent and impartial criticism. It is no easy task to satisfactorily solve the problem forced upon the Government by the location, necessities, and condition of these Sioux tribes; but they have claims upon us that cannot be overlooked. They have been pushed back from the east by the advancing tide of civilization until it meets them again from the west. Their reservation, extending over an area as large as New England, is, for the most part, unsuited to agriculture. The steady extinction of game is cutting them off from the only means of subsistence of which they have any knowledge. They are now practically helpless without the fostering care of the Government. New and prosperous States have been added to the nation from the territory which was once their homes, and but for our people the region thus taken—no matter how—would still afford them subsistence, precarious and uncertain it may be, but suited to their wants and habits. This sacrifice has brought to them destitution and beggary; to our nation wealth and power, and with these an obligation to make good to them, in some way, the loss by which we have so largely gained. We have faith that this obligation will be fairly met and conscientiously discharged by Congress, and

we believe that it should be submitted to that body for immediate consideration and action.

W.B. ALLISON, *Chairman*,
ALFRED H. TERRY.
A. COMINGO.
SAML. D. HINMAN.
G.P. BEAUVAIS.
A.G. LAWRENCE.
WM.H. ASHBY.

J.S. COLLINS, *Secretary*.

[Appendix Omitted in Printing]

[Sioux Exhibit F-23, Docket 74-B]

REPORT

OF

THE COMMISSIONER OF INDIAN AFFAIRS.

[For the Year 1876]

[Portions omitted in printing]

* * * * *

THE SIOUX WAR.

For several years past a camp of Sioux on the Yellowstone River have been known as the northern, or hostile, or non-treaty Sioux, or more commonly as Sitting Bull's band. They are in no sense a recognized band or branch of the great Sioux Nation, but consist of representatives from all the bands, who have rallied around one as their leader who claims never to have been party to any treaty with the United States, and who styles himself chief of the followers whom his personal power and avowed hostility to civilization and the United States Government have attracted around him. This camp at last became a rallying-point for malcontents from the various agencies; a paradise for those who, tired of Government beef and restless under agency restraint, were venturesome enough to resort again to their old life by the chase; a field of glory for the young braves whose reputation for prowess was yet to be made; and an asylum for outlaws among the Indians themselves, who, fleeing thither, might escape retribution for crime.

Having their headquarters in the center of the buffalo country, surrounded by abundance of game, independent of the aid of the Government, scorning its authority, defying its power, and deriding its Army, these desperadoes have skillfully and successfully evaded the frontier garrisons and roamed at will over the plans of Western Dakota and portions of Montana and Wyoming, not only plundering, robbing, and frequently taking the lives of settlers, but extending their hostilities to every tribe of Indians in their vicinity friendly to the United States.

That the Crows, the Shoshones, Bannacks, Arickarees, Mandans, Utes, and the Blackfeet Nation have braved all threats and resisted all inducements offered by these adventurers, and, in spite of repeated losses by depredation, have steadfastly adhered to their friendship to the Government, has sufficiently proved their loyalty; but their pathway to civilization has been seriously obstructed. An Indian cannot be taught to work with hoe in one hand and gun in the other; and repeated examples of unpunished marauding beget restlessness and want of confidence in the Government and increased reluctance to adopt the white man's ways.

The number of the so called bands was estimated last winter to be not over 3,000. From this number not more than six or eight hundred warriors could have been mustered. Recognizing not only the irreparable damage to settlements caused by these desperadoes, but also their disastrous influence in retarding civilization among the friendly tribes, and the demoralizing effect of their proximity in promoting an uneasy feeling among the reservation Sioux, and in affording a refuge for criminals, the Department, in December last, decided to make a final attempt to induce these Indians to come into their agencies, and issued an order requiring them to go upon their reservations by the 31st of January last, or be regarded as hostile and turned over to the military.

To this order, communicated by couriers from the several agencies, no regard was paid. The General and Lieutenant-General of the Army were of opinion that a movement against the "hostiles" undertaken in the winter would be entirely practicable, for which none but the regular troops stationed in that part of the country would be needed; and on the 1st of February these Indians were accordingly turned over to the War Department for appropriate action by the Army.

The increase in the number of Sitting Bull's retainers by accessions from the agency Sioux, already alluded to, and the terrible slaughter of our forces under General Custer, the details of which are familiar to the public, have extended throughout the year what was expected to be a campaign of but few weeks' duration. It is hoped that the coming winter-campaign, for which extensive preparations are now in progress, will result in the unconditional surrender and entire submission of these Sioux, and that this will be known hereafter as the last Indian war.

THE SIOUX COMMISSION.

In the last Indian appropriation act, $20,000 was appropriated, to be expended under the direction of the President, for the purpose of securing from the Sioux Indians the relinquishment of "all right and claim to any country outside of the boundaries of the permanent reservation established by the treaty of 1868 for said Indians, and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude," and to secure "a grant of convenient and accessible way over said reservation to the country thus ceded, for wagon and other roads, from points on the Missouri River, in all not more than three in number." The act further provides that the Indians hereafter shall receive their supplies at such places on their said reservation in the vicinity of the Missouri River as the President may designate; and also, that "no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States which is calculated and designed to enable said Indians to become self-supporting."

In pursuance of the provisions referred to, a commission was appointed in August last, consisting of Hon. George W. Manypenny, Bishop H. B. Whipple, Hon. A.S. Gaylord, Hon. H.C. Bulis, Hon. Newton Edmunds, Col. A.G. Boone, and Dr. J.W. Daniels, who proceeded immediately to the Red Cloud and Spotted Tail agencies, for the purpose of securing from the Indians the agreement contemplated in the above-named act. The commission have not yet submitted their report, but it is understood that their mission has been successful.

For the purpose of providing some suitable location to enable said Indians to become self-supporting, the commision were instructed to consider the propriety of securing the assent of the Indians to their removal to the Indian Territory. Having indicated a willingness to consider the question of removal, a delegation of Sioux are now *en route* to the Indian Territory to examine the country and make report.

The report of the commission, as soon as received by this office, will be forwarded to the honorable Secretary, to be submitted to Congress for its action.

CLAIMS OF THE SIOUX FOR THE RELINQUISHMENT OF NEUTRAL TERRITORY IN NEBRASKA.

It will be remembered that the visit of a delegation of Sioux to Washington, in May, 1875, resulted in an agreement whereby, in consideration of the sum of $25,000 appropriated by Congress, they surrendered their treaty-privilege of hunting in Nebraska. They were also induced to relinquish such claim as they possessed to that portion of Nebraska lying south of the south divide of the Niobrara River, which, by the terms of the treaty of 1868, "should be held and considered unceded Indian territory, and no white person or persons should be permitted to settle upon or occupy any portion of the same, or without the consent of the Indians first had and obtained, should pass through the same."

The Sioux, never having made a clear distinction between the territory described by the treaty of 1868 as neutral and that designated as their permanent reservation, were very unwilling to accede to the wishes of the Department, and consented to the cession of their rights in the above-desribed territory only on receiving the pledge, given by the Secretary of the Interior, that their request for an additional $25,000 in consideration of such cession should be presented to Congress.

This claim failed to be considered by Congress at its last session. The Indian mind seems incapable of discriminating between a promise to present a claim to Congress and a promise to pay the amount of the claim, and the commission recently charged with obtaining further concessions from the Sioux were met at every agency with complaints of the failure of the Government to fulfill what the Indians consider its solemn pledge. In view of the above, and of the importance of the negotiations now pending, I trust that Congress will give this matter favorable consideration at its next session. The expenditure, at their own request, of the $25,000 already received in the purchase of cows, horses, harness, and wagons for the Sioux is a guarantee that the amount hereafter to be appropriated will be of direct assistance to the Government in carrying out its purpose for their civilization, as indicated by the effort now being made to secure their settlement in the Indian Territory.

* * * * *

REPORT

OF

THE COMMISSIONER OF INDIAN AFFAIRS.

[For the Year 1877]

[Portions omitted in printing]

* * * * *

THE SIOUX COMMISSION.

In the months of September and October, 1876, the various Sioux agencies were visited by a commission, appointed under act of August 15 of that year, to negotiate with the Sioux an agreement to surrender that portion of the Sioux reservation which included the Black Hills and certain hunting privileges outside that reserve guaranteed by the treaty of 1868; to grant a right of way across their reserve; and to provide for the removal of the Red Cloud and Spotted Tail agencies from Northwestern Nebraska to the Missouri River. The commission was also authorized to take steps to gain the consent of the Sioux to their removal to the Indian Territory.

From their report, which was published as an appendix to the last annual report of this office, it will be seen that the commission were successful in all the negotiations with which they were charged; and that the Indians made every concession that was desired by the government, although we were engaged at the very time in fighting their relatives and friends. On behalf of the United States, the agreement thus entered into provided for subsisting the Sioux on a stated ration until they should become self-supporting, for furnishing schools, and all necessary aid and instruction in agriculture and the mechanical arts, and for the allotment of lands in severalty. The agreement was ratified by Congress February 28, 1877.

Representatives from the Red Cloud and Spotted Tail agencies with two of the commissioners visited the Indian Territory as a preliminary to a practical consideration of the subject of removal thither. Whether it is probable that by following up the matter on the return of the delegation,

any portion of the Indians of those agencies could have been induced to adopt as a home the country which they visited, I am unable to say. Any effort in that direction was promptly forestalled by a provision in the act of February 28, by which Congress explicitly prohibited "the removal of any portion of the Sioux Indians to the Indian Territory, until the same shall be authorized by an act of Congress hereafter enacted."

* * * * *

IN THE UNITED STATES COURT OF CLAIMS

SIOUX TRIBE OF INDIANS v. THE UNITED STATES

[No. C-531-(7). Decided June 1, 1942. Plaintiff's motion for new trial overruled October 5, 1942]*

Plaintiff seeks to recover $189,368,531.05, together with an additional amount measured by interest as a part of just compensation amounting in all to approximately $739,116,256 for the alleged taking by the defendant in 1877 of certain lands, and rights in lands of the plaintiff, amounting to 73,781,826.19 acres, alleged to have been contrary to and in violation of provisions of treaties of September 17, 1851, 11 Stat. 749, and April 29, 1868, 15 Stat. 635.

The question now before the court under Rule 39 (a) is whether, as a matter of law, the plaintiff tribe has a legal or equitable claim under section 1 of the Jurisdictional Act on which it is entitled to judgment under these treaties or any law of Congress for any amount due from the United States as for the misappropriation of any lands of said tribe, or for the failure of the United States to pay said tribe any money for other property due under any treaties or laws of Congress.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. At the time of the Louisiana Purchase in 1803, the Sioux Indians occupied, with other tribes, a large area of land situated in the territory now comprising the States of Minnesota, Iowa, South Dakota, North Dakota, Nebraska, Wyoming, and Montana, and, of this area, the mountainous region now known as the Black Hills, South Dakota, was a part.

The discovery of gold in California in 1848 resulted in a tide of emigration, some of which passed through Wyoming and Nebraska where several of the Sioux bands of Indians, and those of other tribes, lived, roamed, and hunted. As a result of this western travel a treaty was negotiated with the Sioux Indians, and other Indian tribes of the Northwest, known as the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. Articles 5, 7, and 8 of this treaty follow:

> ARTICLE 5. The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:
>
> The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River, thence in a south-westerly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the headwaters of Heart River; thence down Heart River to its mouth; and thence down the Missouri River to the place of beginning
>
> The territory of the Gros Ventre, Mandans, and Arrickaras Nations, commencing at the mouth of Heart River; thence up the Missouri River to the mouth of the Yellowstone River; thence up the Yellowstone River to the mouth of Powder River in a southeasterly direction, to the head-waters of the Little Missouri River, thence along the Black Hills to the head of Heart River, and thence down Heart River to the place of beginning.
>
> The territory of the Assinaboin Nation, commencing at the mouth of the Yellowstone River; thence up the Missouri River to the mouth of the Muscle-shell River; thence from the mouth of the Muscle-shell River in a southeasterly direction until it strikes the headwaters of Big Dry Creek; thence down that creek to where it empties into the Yellowstone River, nearly opposite the mouth of Powder River, and thence down the Yellowstone River to the place of beginning.
>
> The territory of the Blackfoot Nation, commencing at the mouth of Muscle-shell River; thence up the Missouri River to its source; thence along the main range of the Rocky Mountains, in a southerly direction, to the head-waters of the northern source of the Yellowstone River; thence down the Yellowstone River to the mouth of twenty-five Yard Creek; thence across to the head-waters of the Muscle-shell River, and thence down the Muscle-shell River to the place of beginning.
>
> The territory of the Crow Nation, commencing at the mouth of Powder River on the Yellowstone; thence up Powder River to its source; thence along the main range of the Black Hills and Wind River Mountains to the head-waters of the Yellowstone River; thence down

the Yellowstone River to the mouth of Twenty-five Yard Creek; thence to the head-waters of the Muscle-shell River; thence down the Muscle-shell River to its mouth; thence to the head-waters of Big Dry Creek and thence to its mouth.

The territory of the Cheyennes and Arrapahoes, commencing at the Red Bute, or the place where the road leaves the north fork of the Platte River; thence up the north fork of the Platte River to its source; thence along the main range of the Rocky Mountains to the Head-waters of the Arkansas River; thence down the Arkansas River to the crossing of the Santa Fe road; thence in a northwesterly direction to the forks of the Platte River, and thence up the Platte River to the place of beginning.

It is however, understood that, in making this recognition and acknowledgement, the aforesaid Indian nations do not hereby abandon or prejudice any rights or claims they may have to other lands; and further, that they do not surrender the privilege of hunting, fishing, or passing over any of the tracts of country heretofore described.

ARTICLE 6. The parties to the second part of this treaty having selected principals or head-chiefs for their respective nations, through whom all national business will hereafter be conducted, do hereby bind themselves to sustain said chiefs and their successors during good behavior.

ARTICLE 7. In consideration of the treaty stipulations, and for the damages which have or may occur by reason thereof to the Indian nations, parties hereto, and for their maintenance and the improvement of their moral and social customs the United States bind themselves to deliver to the said Indian nations the sum of fifty thousand dollars per annum for the term of ten years, with the right to continue the same at the discretion of the President of the United States for a period not exceeding five years thereafter, in provisions, merchandise, domestic animals, and agricultural implements, in such proportions as may be deemed best adapted to their condition by the President of the United States, to be distributed in proportion to the population of the aforesaid Indian nations.

ARTICLE 8. It is understood and agreed that should any of the Indian nations, parties to this treaty, violate

any of the provisions thereof, the United States may withhold the whole or a portion of the annuities mentioned in the preceding article from the nation so offending, until, in the opinion of the President of the United States, proper satisfaction shall have been made.

2. The discovery of gold in Montana in 1861 resulted in a further tide of white emigration through the territory occupied by the Sioux Tribe of Indians, as described in the treaty of 1851. This line of travel was northward from the California Trail, near old Fort Laramie, Wyoming, along the valley of the Powder River, to and across the Yellowstone River and westward into the gold fields of Montana. As a result of this travel, disputes and conflicts arose with the Indians over this route on account of the large number of white travelers passing along it, and, between 1861 and 1867, there were a number of military engagements between the Government and the Indians.

3. Following the so-called Powder River War of 1866 and 1867 with the Sioux Indians, a treaty was entered into between the United States and the various bands of the Sioux Indian Tribe which was concluded April 29, 1868, and was ratified February 16, 1869, and proclaimed February 24, 1869; 15 Stat. 635, 640. This treaty was negotiated, made, and ratified pursuant to an act of Congress of July 20, 1867, 15 Stat. 17 as follows:

> That the President of the United States be, and he is hereby, authorized to appoint a commission to consist of three officers of the army not below the rank of brigadier general, who, together with N. G. Taylor, Commissioner of Indian Affairs, John B. Henderson, Chairman of the Committee of Indian Affairs of the Senate, S. S. Tappan, and John B. Sanborn, shall have power and authority to call together the chiefs and headmen of such bands or tribes of Indians as are now waging war against the United States or committing depredations upon the people thereof, to ascertain the alleged reasons for their acts of hostility, and in their discretion, under the direction of the President, to make and conclude with said bands or tribes such treaty stipulations, subject to the action of the Senate, as may remove all just causes of complaint on their part, and at the same time establish security for person and property along the lines of railroad now being con-

structed to the Pacific and other thoroughfares of travel to the western Territories, and such as will most likely insure civilization for the Indians and peace and safety for the whites.

SEC. 2. And be it further enacted, That said, commissioners are required to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky mountains, not now peacefully residing on permanent reservations under treaty stipulations, to which the Government has the right of occupation or to which said commissioners can obtain the right of occupation, and in which district or districts there shall be sufficient tillable or grazing land to enable the said tribes, respectively, to support themselves by agricultural and pastoral pursuits. Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person[s] not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States: Provided, That the district or districts shall be so located as not to interfere with travel on highways located by authority of the United States, nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad, the Union Pacific Railroad Eastern Division, or the proposed route of the Atlantic and Pacific Railroad by way of Albuquerque.

General Wm. T. Sherman, General Wm. S. Harney, and General C. C. Augur were designated commissioners by the President, as the three Army officers provided for in the statue.

4. In the fall of 1867, the treaty commissioners submitted a proposed treaty to a large number of the leaders and members of the Sioux Indians at Fort Laramie. The negotiations between the commissioners and the leaders and members of the various bands of the Sioux Tribe of Indians continued in the spring of 1868. Upon the insistence of the Indians certain concessions were made by the commissioners representing the United States. As a result the treaty was agreed to by the portion of the Sioux chiefs, leaders, and members of the tribe (Red Cloud and his band) at Fort Laramie on April 29, 1868, and the treaty was subsequently agreed to at various following dates by Sioux chiefs, leaders, and members of all the remaining bands of the Sioux Tribe.

The plaintiff tribe consists of members of the Sioux Tribe of Indians of the Rosebud Indian Reservation in the State of South Dakota; of the Standing Rock Indian Reservation in the States of North Dakota and South Dakota; of the Pine Ridge Indian Reservation in the State of South Dakota; of the Cheyenne River Indian Reservation in the State of South Dakota; the members of the Sioux Tribe of the Crow Creek Indian Reservation in the State of South Dakota; the members of the Sioux Tribe of the Lower Brule Reservation in the State of South Dakota; the members of the Sioux Tribe of the Santee Indian Reservation in the State of Nebraska; and the Indians of the Sioux Tribe of the Fort Peck Indian Reservation in the State of Montana.

The Sioux Indians who were parties to the 1868 Treaty, *supra*, were those Indians, or the ancestors of the Indians, who still belonged to the same bands designated in the said treaty but who are now, by reason of subsequent acts of Congress and agreements ratified by the Congress, the plaintiffs in this action.

This treaty of 1868, 15 Stat. 635, so far as pertinent here, provided as follows: [Portions of treaty omitted in printing; entire treaty is reproduced elsewhere in Appendix]

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

* * * * *

ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and

undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided. * * *.

ARTICLE X. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, or [or before] the first day of August of each year, for thirty years, the following articles, to wit:

* * * * *

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. *And it is*

hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. [Italics ours.] * * *.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement *hereby stipulate that they will relinquish all rights to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase.* And they, the said Indians, further expressly agree: [Italics ours.]

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte River and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the Government will pay the tribe whatever amount of damage may be assessed by three

disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte River, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI of this treaty.

ARTICLE XV. The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; *but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI hereof.* [Italics ours.]

ARTICLE XVI. The United States hereby agrees and stipulates that *the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same;* and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed. [Italics ours.]

5. The portion of the land in controversy in this case embraced within the boundaries described in art. 2 of the treaty of 1868 for the absolute and undisturbed use and occupation of the Indians, known as the Black Hills lands, consists of about 7,345,157 acres lying between the 43rd and 46th standard parallels east of the 104th meridian and west of the 103rd meridian and the forks of the Cheyenne River. This land, which it is claimed was taken or misappropriated by the defendant, is designated in the petition as "Class A" land. The other land denominated in the petition as "Class B" land, for which compensation as for a misappropriation is claimed in violation of art. 5 of the treaty of September 17, 1851, and articles 11, 15, and 16 of the treaty of 1868, consists of 25,858,595 acres lying west of the Missouri River and included in the outer boundaries described in the treaty of September 17, 1851, but exclusive of the area described as the permanent reservation by art. 2 of the treaty of 1868.

Claim is also made for compensation for hunting rights in other land alleged to have been misappropriated, denominated in the petition as "Class C," consisting of 40,578,123 acres under the treaty of 1851 and the treaty of 1868 lying west and north of the irregular boundary line established by the treaty of 1851 as the western and northern boundaries of the Sioux country.

6. May 11, 1874, the Secretary of War authorized and approved an expedition by Lieut. Colonel Custer into the Black Hills country within the boundaries of the Sioux permanent reservation under the treaty of 1868 for the purpose of exploring the Black Hills country. Prior to that time there had been, about 1861 and again in 1873, some public rumors and agitation with reference to the desirability of the Black Hills—its rich land, fine timber, good climate, and abundant water supply—for white settlements and for mining, because of its gold-bearing possibilities. Prior to and at the time the treaty of 1868 was made the Sioux Indians knew that the Black Hills contained some gold, but the Government had no accurate information about the matter and, up to that time, no exploration of the area had been made. The Custer Expedition left Fort Abraham Lincoln, Dakota Territory (now North Dakota), July 2, 1874, and returned to that Fort August 22, 1874. On this expedition gold was discovered in paying quantities in the Black Hills within the Sioux Reservation. This discovery of gold was made public in dispatches to the public prints August 27, 1874 and thereafter, whereupon a movement of white citizens soon began toward the gold region of the Black Hills and, in 1875, invaded that territory which was within

the permanent reservation of the Sioux Tribe of Indians. Upon return of the Custer Expedition in 1874, the Indians of the Sioux Tribe became aware that the Black Hills contained gold in paying quantities. At that time the Black Hills area was surrounded on almost all sides by white settlements; railroads were in operation, the Union Pacific to the south and the Northern Pacific to the north of the Black Hills; and the Missouri River carried a heavy traffic in steamboats. Thus, facilities were open to white citizens to within comparatively short distances of the Black Hills' gold fields.

7. Before the above-mentioned exploration expedition the Congress in the act of June 23, 1874, 18 Stat. 202, 224, appropriated $25,000 "for presents to the Sioux of the Red Cloud and Whetstone or Spotted Tail Agencies, on condition that said Indians shall relinquish their right, under treaty-stipulations, to hunt in Nebraska." These hunting rights were granted under arts. 11, 15, and 16 of the 1868 treaty and are within the area herein denominated "Class B" land. The commission appointed and authorized to carry out this provision of the act failed in their efforts to secure from the Indians the desired relinquishment. In May 1875 it became imperative, in the opinion of the President, to bring a delegation from the Sioux Tribe to Washington for a preliminary discussion of the matter of purchase by the Government of the hunting rights and the Black Hills section of the Sioux Reservation, and the opening of the Big Horn Mountain country for settlement and mining. Negotiations to that end were renewed by the President in June 1875 when the delegation of the Sioux Indians visited Washington to consider the matter further. This delegation consisted, among other Indians, of Red Cloud, Sitting Bull, Spotted Tail, Lone Horn, and Little Wound. A council was held May 27, 1875. On that day the Secretary of the Interior stated to the Indians, in part, as follows:

> Now I want you to remember another thing. This treaty of 1868 set off a large tract of country for you to occupy, lying in the north part of the United States and away west.
>
> It also provided that you might hunt in all the country north of the North Platte and east of the Big Horn Mountains.
>
> It also provided that you might hunt on the Smoky Hill Fork of the Republican, as long as the buffalo ranged there, so as to justify the chase. This was nearly seven years ago; now the buffalo is not found on the Smoky Hill Fork of the Republican, so as to make it worth while to hunt them. The buffalo north of the North Platte have also been driven away, to such an extent, that you cannot find any large quantities there, and the white people are pressing the Government for the privilege of settling also along the Smoky Hill Fork of the Republican.
>
> We cannot stop the white people from going out there. We cannot prevent them from anxiety to take these lands, especially when the buffalo are gone so as to render it undesirable for you to be there.
>
> Now you see the Government has more children than you; you are the Government's children, the children of the Great Father; so are the white people; and the Great Father has to do what is best for all.
>
> I want you to consider these things for the purpose of doing what is best for all the children of the Great Father.

On June 3, 1875, the President held a council with the Indian delegation with reference to the relinquishment by the Sioux Tribe and the acquisition of the Government of certain hunting rights and also the Black Hills portion of the reservation. The President stated to the Indians in part as follows:

> In regard to the Black Hills, I look upon it as very important to them [the Indians] to make some treaty by which, if gold is discovered in large quantities, the white people will be allowed to go there, and they receive a full equivalent for all that is rendered.
>
> If gold is not found there in large quantities, of course the white people won't for the present want to go there, and their country will be left as it is now.
>
> The Secretary of the Interior, and the Commissioner of Indian Affairs, will explain to them hereafter, about what would be probably a fair equivalent to the white people and to them which should be given in case they should surrender the Black Hills, or the portion in which gold may be found. As I pointed out to you before, there will be trouble in keeping white people from going there for gold, if it should be discovered * * * it is possible that strong efforts might not be made to keep them out.
>
> My interest is in seeing you protected, while I have the power to make treaties with you which shall pro-

tect you. After you go back to your homes and have been there a sufficient time to talk pretty generally with your people, if I get such a word from you as to make it seem desirable, I will appoint commissioners to go out to confer with you. But it is important to you that while you are here, you settle the question of the limits of your hunting grounds, and make preliminary arrangements to allow white persons to go into the Black Hills. If it should come to the purchase of the Black Hills or a portion of that country from you I would try to see you get a full equivalent in value, and that that money be paid out in U.S. bonds and deposited here, so that the interest would be drawn twice a year for your benefit, and expended for your benefit each year as might be agreed upon, and I look upon it as very important to you, and your children, the Indians who come after you, that you encourage all you can, the children attending schools, in speaking English and preparing yourselves for the life of white men.

SECRETARY. The agreement for the relinquishment of the hunting privileges in Nebraska has been drawn up ready for you to sign.

The PRESIDENT. That agreement has been shown to me and I approve of it and would be glad to have you sign it. I will say again whenever the Secretary of the Interior and the Commissioner of Indian Affairs talk to you they talk for me, and if there is any point they cannot quite agree upon they will submit the views of the Indians and their own views to me to decide between them.

One word more that has nothing to do with this—I have always felt, ever since I was a young officer of the Army, a great interest in the welfare of the Indians. I know that formerly they have been abused and their rights not properly respected. Since it has been in my power to have any control over Indian affairs, I have endeavored to adopt a policy which should be for your future good, and calculated to preserve peace between the whites and Indians for the present; and it is my great desire, now while I can retain some control over the matter, that the initiatory steps should be taken to secure you and your children hereafter. If you will cooperate with me I shall look always to what I believe is for your best interests. Many of the Indians who accepted [at] an early day what we proposed to you today

are now living in houses, have fences around their farms; have school houses, and their children are reading and writing as we do here. * * *

Where there is a population of industrious people who understand how to work, they cannot let their population be pent up and be destroyed while there is territory where they can go and get a subsistance. And what I want to do is to prepare the Indian for a contingency that will be sure to arise, so that he will be able to live upon the ground and get a support from it. The same as white people. This question that he [Red Cloud] is discussing, is one of sentiment, but it will have to give way before the growth of numbers who are not going to starve, merely out of a sentimental consideration of a title that others may have.

In all this matter, and in all my dealings with the Indians, as I have explained frequently, and once or twice today, I am looking more to their interests than to ours; and I am very anxious that the Government of the United States should pay them in a way that will be of most benefit to them, a full equivalent for all that they have given up, and this is the only way I see a chance of their having in the future a fair equivalent for what they surrender.

You may say to Red Cloud, in answer to what he stated a little while ago, that he did not like to have money collected for what is his, that what we are doing, is paying money which is not his, for buffalo which he claims, but which he has not the right to.

These negotiations resulted in the signing of an agreement by the Indians at their agencies in June 1875 with reference to the hunting rights, the Indians consenting to the agreement upon the condition that the Secretary of the Interior would submit to Congress their claim for an additional $25,000. The Secretary of the Interior complied with the request and submitted the matter to Congress but the Congress did not consider the same. The agreement, which was signed by 34 chiefs and headmen at the Sioux Tribe Agency and 19 chiefs and headmen at the Red Cloud Agency on June 23, 1875, was entitled "Agreement between the United States and the Sioux for the Relinquishment of Hunting Rights in Nebraska," and was as follows:

We, the chiefs and headmen of the Ogallalla, Brule, and other Sioux tribes of Indians, having heard a full

explanation of the wishes of the Government of the United States, that we should surrender the privileges contained in the treaty of 1868, to hunt in Nebraska, and in all the country south of our reservation, and all our rights in what is called in said treaty the unceded territory, so far as such territory is contained within the limits of Nebraska, which rights and privileges are particularly described in articles eleven and sixteen of said treaty; and being fully informed that the sum of twenty-five thousand dollars has been appropriated by Congress for the purchase of presents for the Sioux of the Red Cloud and Spotted Tail agencies, to be received by us in compensation for the relinquishment of the privileges above named, do hereby agree to surrender all privileges of hunting and all other rights and privileges in Nebraska and on the Republican Fork of Smoky Hill River, secured to us by said treaty.

Provided, That we do not surrender any right of occupation of the country situated in Nebraska north of the divide, which is south of and near to the Niobrara River, and west of the 100th meridian; but desire to retain that country for future occupation and use.

Although Congress did not specifically ratify the above-quoted agreement or make its provisions the terms of an act of Congress, the $25,000 mentioned therein was appropriated by Congress and disbursed for the benefit of the Indians in the purchase of cows, horses, harness, and wagons, and the Indians continued freely to use and enjoy the hunting rights and privileges mentioned in the agreement until after the enactment of the act of February 28, 1877, 19 Stat. 254, hereinafter referred to.

8. Prior to and during 1876, trouble arose between the government and certain of the Sioux Indians, particularly with "Sitting Bull" and "Crazy Horse," and their bands, in connection with the survey and construction of the Northern Pacific railroad, referred to in article 11 of the treaty of 1868, and in connection with raids and depredations committed by these bands on white settlers and other Indian tribes in treaty relations with the United States. This trouble culminated in war, which began in March 1876 and ended in September 1877. Jurisdiction over the Sioux Tribe of Indians was surrendered by the Interior Department and transferred to the War Department in December 1875. It is not necessary here to set forth the details as to the military campaigns against certain bands of the Sioux Indians, or as

to what occurred in that connection during the years 1876 and 1877. The right or wrong of the policy pursued by the Government in connection therewith was a political, not a judicial, question.

9. Following the Custer Exploration Expedition into the Black Hills in 1874, as hereinbefore mentioned, and the accounts made public in that year of the discovery of gold in large quantity in that region and of the rich agricultural lands therein, and the fine timber on the lands, public pressure for the opening of the Black Hills country increased. The Government, through its military establishment, endeavored to keep white settlers and gold prospectors out of the Black Hills territory within the Sioux Reservation and, for awhile, it was successful, but it became practically impossible for the Government to expel the intruders or to prevent further intrusions into the Hills. Although the Indians resented the intrusion of the whites into the Black Hills there were no hostilities between the Indians and the white emigrants in this area, doubtless because of the presence of the military, and it does not appear that the Government had any military engagements with the Sioux on account of the Black Hills matter. Throughout the fall and early winter of 1875–1876, troops from Fort Laramie and Fort Lincoln were sent to the Black Hills on several occasions to remove trespassers. By December 1875 the troops had rounded up and taken out practically all persons in the Black Hills, except a comparatively small number who had succeeded in evading the troops. This activity on the part of the Government was kept up until after the so-called cession agreement of September 29, 1876, and the enactment of the act of February 28, 1877. The Government in July and August 1876, endeavored to blockade all roads leading to the Hills and to drive out those settlers or miners who were in the Black Hills, and to keep others from coming in.

10. April 6, 1872, the Governor of Dakota Territory issued the following proclamation:

> Information having reached the office of the Executive of said Territory, through various sources, to the effect that combinations of men have been and are now being made with a view to entering and occupying the region of country known as the "Black Hills" of Dakota, which is within the Reservation belonging to the Sioux Indians, under the plea that the said Black Hills country has valuable mineral deposits, as well as quantities of timber fit for lumber.

Now, therefore, I, Edwin S. McCook, Secretary and Acting Governor of the Territory of Dakota, by the direction of the President of the United States, through the Hon. Columbus Delano, Secretary of the Interior, do hereby warn all such unlawful combinations of men, of whatever locality, or under whatever plea or excuse operating, that any such attempt to violate our Treaty stipulations with these Indians, or disturb the peace of the said Territory, by an effort to invade, occupy or settle upon said Reservation, will not only be illegal, and likely to disturb the peace between the United States and said Indians, but will be disapproved by the Government. And if such efforts are persisted in, the Government will use so much of its civil and military as may be necessary to remove from this Indian Territory all persons who go there in violation of law.

September 15, 1874, the Commanding Officer of the military forces in the Dakota Territory issued the following order to the appropriate military officer:

Should the companies now organizing at Sioux City and Yankton trespass on the Sioux Indian Reservation, you are hereby directed to use the force at your command to burn the wagon-trains, destroy the outfit and arrest the leaders, confining them at the nearest military post in the Indian country. Should they succeed in reaching the interior, you are directed to spend such force of cavalry in pursuit as will accomplish the purposes above named.

March 16, 1875, the Adjutant General of the Army, by direction of the President, sent the following instructions to the Commander Officer of the Dakota Territory:

The President requests you to make public the following:

"All expeditions into that portion of the Indian Territory known as the Black Hills country must be prevented as long as the present treaty exists. Efforts are now being made to arrange for the extinguishment of the Indian title, and all proper means will be used to accomplish that end. If, however, the steps which are to be taken toward the opening of the country to settlement fail, those persons at present within that Territory without authority must be expelled."

11. June 18, 1875, the Commissioner of Indian Affairs, by direction of the President, gave the commission appointed to negotiate with the Indians for the acquisition by the Government of the Black Hills section of their reservation the following letter of instructions:

GENTLEMEN: You have been appointed by the Honorable Secretary of the Interior under the direction of the President, as members of the commission to negotiate with the Sioux Indians relative to the procurement of a cession by them of such portion of that country known as the Black Hills, between the North and South Forks of the Big Cheyenne, as the President may determine to be desirable for the Government to purchase for mining purposes, and a relinquishment of their rights to that portion of Wyoming known as the Big Horn Mountains and lying west of a line running from the point where the Niobrara River crosses the east line of Wyoming to the Tongue River, said line to keep distant on the east not less than fifty miles from each of the forts formerly known as Fetterman, Reno, and Kearney, and also of the necessary right of way through their country to reach the country ceded.

By reference to the treaty of 1868, made with these Indians, sections 2 and 16, copy of which is herewith inclosed, you will be informed as to the nature and extent of the respective claims of the Sioux to these tracts of country. That portion of the Black Hills country which lies within the boundaries of Dakota is, without dispute, a part of their permanent reservation. The country mentioned in Wyoming, as described in the sixteenth section of the treaty above referred to, is a portion of "unceded territory." To this the Indians have no claim except for hunting purposes and the exclusion of other people.

By reference to a map of this country, inclosed herewith, you will observe that the cession of the Black Hills, and the relinquishment of the Big Horn country leaves a considerable tract between these two cessions still within the claim of the Indians, as defined in the sixth section. This region, especially along the Powder River, is known as the Sioux hunting ground for buffalo, and is intended still to be preserved to them for that purpose, a passage to it being left open on the north of the North Fork of the Cheyenne, as well as on the south of the South Fork.

The Sioux who are parties to the treaty of 1868, by which the rights involved in this negotiation were as-

sured to them, are now found at six different agencies—Santee, Crow Creek, Cheyenne River, Standing Rock, Red Cloud, and Spotted Tail. They number not far from 35,000. There are also probably not far from 3,000 to 5,000 who roam over the Black Hills country, and to the north and west of it, who have not been enrolled at any agency, and who were only indirectly represented at the making of the treaty of 1868. It is deemed necessary in order to bring this matter fairly before the large body of Indians interested, that a portion of the commission shall visit them at their respective agencies, and procure such interviews as may be possible with the roaming Indians, and lay definitely before them all the wishes of the Government and their own necessities and interests as involved in the question of the desired cession, and invite the Indians at their agencies to send representative men to a general council, to be held at as early a day as practicable at Fort Sully, on the Missouri River; which general council all the members of the commission are expected to attend.

In negotiating with these ignorant and almost helpless people you will keep in mind the fact that you represent them and their interests not less than those of the Government and are commissioned to secure the best interests of both parties, so far as practicable. Great care should be taken in your interviews not only to secure proper and exact interpretations of the communications passing between you, but also to satisfy the Indians that their words are fairly conveyed in English. Rev. S. D. Hinman, a member of your Commission, is entirely competent to give an exact rendering both of the English and of the Sioux. It will be well also in every case to employ the services of such an interpreter as the Indians may select, so as to secure between the services of the two not only exactness but the entire confidence of the Indians.

In presenting this subject to the Indians they should first of all be assured of the kindly intentions of the President and the Government toward them. They should, if possible, be made to understand that this effort on the part of the Government to procure a portion of their country originated solely in a desire for the continuance of peace between them and the whites; that since the opinion that gold is to be found in the

Black Hills has prevailed among the people it has been almost impossible to prevent white persons from entering their country, and that there is no little danger that, spite of all efforts to the contrary, some evilly-disposed persons will break through the line, and that conflict and blood will ensue.

You will also assure the Indians that it is not the wish of the Government to take from them any of their property or rights, without returning a fair equivalent therefor, and that you have come, representing their Great Father, to fix upon an equivalent which shall be just both to them and to the white people.

You will be careful in your negotiations to keep constantly impressed upon the minds of the Indians that any agreement entered into at the council is to be brought back to the President, and by him to be submitted to Congress for consideration by that body; and that, until the contract has received the approval of Congress, it can not be binding upon either party.

Respecting the right of way, this should be left to the discretion of the President, as to the routes to be selected, and as to any restrictions to be imposed upon parties using the routes. * * *

12. This commission held councils with the leaders and members of the Sioux Tribe in their country, but was unable to arrive at any terms with the Indians for the relinquishment or sale of the Black Hills. The efforts of the commission to secure the results desired by the Government were fruitless, and, on June 29, 1875, the commission submitted to the Indians their final propositions:

(1) To purchase the license to mine and, also as incidental thereto, the right to grow stock and to cultivate the soil in the country known as the Black Hills, beginning at the junction of the North and South Forks of the Cheyenne River and embracing all the territory between said rivers lying west of said junction to the one hundred and fourth meridian of longitude west from Greenwich, the United States agreeing to pay therefor the sum of $400,000 per annum; the United States reserving the right to terminate said license at any time by giving two years' notice by proclamation, and payment of the full amount stipulated for the time the license may continue; and at the expiration of said term, all private property remaining upon said territory shall revert to the Sioux Nation; and such an amount of

said $400,000 as the Congress shall determine, not less than $100,000 annually, shall be expended for objects beneficial for their civilization, and the remainder of said annual sum shall in like manner be expended for their subsistence; or, if the Sioux Nation prefers it:

(2) To purchase the Black Hills, as above described, from the Sioux Nation and to pay them for their interest therein the sum of $6,000,000 in fifteen equal annual instalments; the said sums to be annually appropriated for their subsistence and civilization, not less than $100,000 of which shall be annually expended for purposes of civilization.

(3) The commissioners further proposed to the Indians to purchase all that portion of what was known as the Big Horn country in Wyoming lying west of a line beginning at the northwest corner of the State of Nebraska and running in a northwesterly direction to the Yellowstone River where the one hundred and seventh meridian west of Greenwich crosses said river, and to pay the Indians for their interest therein the sum of $50,000 annually for ten years, amounting to $509,000, to be paid in cows and other livestock and in such implements of husbandry as should be convenient to stockgrowing and as may be deemed advisable by the President.

The Indians refused to consider the question of cession of that portion of Wyoming known as the Big Horn country on the ground that it was valuable to them to roam over and hunt upon and would not consent to surrender it. The commission, having serious doubts whether there was gold in the Black Hills in sufficient quantity to make mining profitable, submitted the above-mentioned Black Hills proposition in the alternative. The Indians refused the offer. The commission so reported to the President.

13. Theretofore, on March 27, 1875, by direction of the President, Walter P. Jenney, mining engineer, was instructed and authorized to make a survey of the Black Hills and report on the mineral, the timber, and the agricultural resources thereof. On November 8, 1875, he submitted a report as follows:

> SIR: In compliance with your request for preliminary statements respecting the mineral and agricultural resources of the Black Hills in Dakota, and the work done under my direction during the past summer in exploring and mapping that portion of the Territory, I have the honor to make the following report in brief: * * *

Without entering into details regarding the manner of working or of incidents in the history of the expedition; how on reaching the hills, I found miners prospecting on French Creek; how after a month's work gold was found in paying quantities on Spring and Rapid Creeks; how the miners poured by hundreds into the hills, and accompanying me, gave me great assistance in prospecting the country; I will briefly state such results of the work as will tend to throw light on the probable future value of the region.

That portion of the Black Hills which may be designated as Harney's Peak gold field is almost wholly in Dakota, and extends about fifty miles north and south with an average breadth of nearly twenty miles, covering an area of not less than eight hundred square miles. The valuable gold-deposits, however, are found in the valleys of the streams which drain that area, the gold being derived from the disintegration of the quartz-ledges, which are very numerous in the rocks of that region.

The most extensive and valuable deposits of auriferous gravel discovered during the past season were in the valleys of Spring and Rapid Creeks and their tributaries, where, in almost every case, the gravel-bars are very advantageously situated for working, and where many natural circumstances contribute materially to the profitable extracting of the gold which they contain.

Timber of suitable size and quantity for the construction of flumes and sluices is abundant; the water supply is, in most localities, ample, and the fall of the streams sufficiently great to enable the water to be readily carried above the level of even the more elevated bars and deposits of gravel.

While as yet there have been discovered in the Black Hills no deposits of gravel sufficiently rich in gold to be profitably worked in the primitive manner with pan or rocker, yet there are many bars in the Harney's Peak field, especially upon Spring Creek, the forks of Castle and Rapid Creeks, and the valleys of those mountain streams, which, when skillfully worked by gangs of miners with sluices, will yield a good return for the labor employed and the moderate capital required to be invested. But little could be done in a single season in prospecting the numerous segregated quartz veins of this region, some of which undoubtedly contain gold. I have procured abundant samples for testing their value by assay.

The Bear Lodge gold field, situated in the extreme northwestern portion of the hills, is wholly in Wyoming, and entirely separated from the Harney Peak region. It does not exceed fifty square miles in area; the gold deposits are small compared with those on Rapid Creek, and are remarkable for the absence of quartz in the gravel, the gold being derived from the disintegrations of feldspar prophyry, carrying irregular masses of iron and manganese ore.

It is difficult to determine the agricultural resources or climate of the Black Hills by the observation of a single season, especially as I could gain but little information respecting the severity of the winters or the prevalence of early and late frosts. The Black Hills rise like an island from an ocean of grass covered and treeless plains, watered by occasional and scanty supplies of rain; and the winds in passing over these plains gather some moisture which they part with as rain on being chilled by contact with the colder and more elevated region of the central portions of the hills. The result of this is the prevalence of frequent though not heavy rain-falls, giving to the hills a most peculiar climate. There is scarcely a day from May to August without one or two showers, yet owing to the dryness of the atmosphere, the climate was found to be very healthy. During the past season, after August 1, very little rain was experienced and some of the smaller streams contained water only in pools. That this remarkable rain-fall, in a region where the average fall does not exceed ten inches for the whole year, was not the exhibition of a peculiarly wet season, I can only judge by observation on the growth of the plants and trees.

The abundance of trees and the coarseness of their grains, as well as the growth of plants on dry hillsides exposed to both sun and wind, tend to show that the season which I witnessed was by no means a very unusual one, though the amount of rain may have been somewhat greater than usual.

The area of land suitable for cultivation is, from the mountainous character of the region, limited as compared with the vast area embraced in the hills, but the soil along the streams and in most of the valleys is deep and fertile, and will be sufficient for the requirements of the population which the hills will support as a stock-raising community. I should judge from the observations which I have had the opportunity to make that at least one-twentieth of the three thousand square miles embraced in the Black Hills may be fairly described as arable lands, and that among these lands

lying near the streams and continuous through the hilly country are large tracts of land forming the slopes of the hillsides which, while not arable, will afford fine grazing, thus largely enhancing the value of the lands to which they are contiguous.

Among the rocky areas of the Harney's Peak range, and in the northern portion of the hills, there are regions where the grasses are comparatively wanting, but generally, throughout the whole area of the hills a luxuriant growth of the finest grasses is to be found, even covering the ground under the shade of the pine trees upon the elevated divides between the streams.

The abundance and fine quality of the grasses and the shelter afforded to stock by the densely timbered slopes and deep valleys will make it a region well adapted to stock-raising purposes.

The timber of the hills is a variety of pine known as yellow or heavy pine; the grain of the wood, is straight, rather coarse, splitting readily and where the trees have escaped the action of fires and violent gales, good straight logs, free from knots, and from 40 to 60 feet in length, and from 12 to 24 inches in diameter, can be obtained in abundance. Spruce of good quality is found among the canons in the interior, and white birch, oak, and elm, of medium size, among the hills on the eastern slope.

The water throughout the hills is excellent in quality, mostly derived from springs among the limestone, or the granitic or schistose rock; only in localities among the foothills is it contaminated by alkali.

14. In his annual report for the fiscal year 1875, the Commissioner of Indian Affairs, reporting on the Black Hills condition, stated as follows:

> The public excitement mentioned in my last report, occasioned by the discovery of gold in that portion of the Sioux reservation known as the Black Hills country, increased to such a degree in the opening of the spring season as to require action looking toward the purchase of this country from the Sioux proprietors and the opening up of the Big Horn Mountain country for settlement and mining. For this purpose, as well as for completing the negotiation for the relinquishment by the Sioux of their hunting rights in Nebraska and Kansas, a large delegation of this tribe, composed of representatives from those agencies, was brought to Washington in May last for an interview with the President.

It was not expected that this interview could conclude the purchase, but that it would prove a preliminary step by which the Sioux tribe would become acquainted with the wishes of the Government and its purposes relative to their own necessities and interests. Accordingly, at the request of the delegation, the President sent a commission, of which Hon. W. B. Allison, of the United States Senate, was made chairman, to negotiate at a general council of the tribe in their own country. The commission has not yet submitted its report, but I am informed that the negotiations have failed on account of a wide disagreement as to the value of the rights to be relinquished by the Sioux. Meanwhile, notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the Hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country. A mining association has been organized, laws and regulations have been adopted for mutual protection, and individual claims staked out, in the right to which they expect hereafter either to be protected by the Government or to protect themselves.

In this serious complication there seems to be but one alternative for the Government; either to so increase the military force and adopt such summary means as will insure a strict observance of the treaty rights of the Sioux by preventing all intrusion, or to renew the effort of negotiation. However, unwilling we may be to confess it, the experience of the past summer proves either the inefficiency of the large military force under the command of such officers as General Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others.

The occupation and possession of the Black Hills by white men seems now inevitable, but no reason exists for making this inevitability an occasion of wrong or lasting injury to Sioux. If an Indian can be possessed of rights of country, either natural or acquired, this country belongs for occupation to the Sioux; and if they were an independent, self-supporting people, able to

claim that hereafter the United States Government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support; they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If, therefore, all attempts at negotiation have failed on the plan of going first to the Indians, I would respectfully recommend that legislation be now sought from Congress, offering a fair and full equivalent for the country lying between the North and South Forks of the Cheyenne River, in Dakota, a portion of which equivalent should be made to take the place of the free rations now granted.

Survey of the Black Hills–
Their Value to the Indians.

In order to provide for the question of a fair equivalent for this country, by direction of the President, a topographical and geological survey of the Black Hills was ordered, the preliminary report of which, by Walter P. Jenney, mining engineer in charge, will be found herewith. It furnishes many interesting and important facts respecting a region hitherto almost unknown. Professor Jenney and his assistants are entitled to large credit for the conscientious diligence and thoroughness, which are apparent at every point in their work. The aid rendered by the War Department, by the courtesy of the General of the Army, and by Col. R.I. Dodge, commanding the escort, has been invaluable to the success of the survey. Without such aid, no satisfactory results could have been obtained, on account of the limited funds available for this purpose. The report confirms, in a large degree, the statements

of travelers and explorers and the reports of General Custer's military expedition of last year, and shows a gold field with an area of eight hundred square miles, and around this gold region, principally to the north, an additional area within the Black Hills country of three thousand square miles of arable lands, and this latter embracing along its streams an area equal to two hundred square miles finely adapted to agriculture, while the hill sides and elevations contiguous thereto are equally adapted to purposes of grazing, making the whole area of three thousand square miles of timber, grazing, and arable land of great value for agricultural purposes.

According to the findings of this report, if there were no gold in this country to attract the white man, and the Indians could be left to undisturbed occupation of the Black Hills, this region, naturally suited to agriculture and herding, is the one of all others within the boundaries of the Sioux reservation best adapted to their immediate and paramount necessities. I doubt whether any land now remaining in the possession of the General Government offers equal advantages; but it will be found impracticable to utilize the country for the Sioux. So long as gold exists in the same region, the agricultural country surrounding the gold fields will be largely required to support the miners, and to attempt to bring the wild Sioux into proximity to the settlers and miners would be to invite provocations and bloody hostility.

These facts respecting the country which the Sioux seem about to be compelled to surrender, for the sake of promoting the mining and agricultural interests of white men, have an important bearing upon the question of compensation which shall be allowed for their lands; for it must be borne in mind that unless the Sioux Nation becomes extinct, of which there is no probability, the time is close upon them when they must have just such an opportunity for self-support as that which is now known to be offered in the Black Hills; and if, for the want of another such country, they are obliged to begin civilization under increased disabilities, humanity as well as equity demands that such disability shall be compensated by increased aid from the Government; and to avoid the perils of future legislation, or want of legislation, the compensation

should be provided for and fixed at the time when we are taking away their valuable lands.

The fact that these Indians are making but little if any use of the Black Hills has no bearing upon the question of what is a fair equivalent for the surrender of these rare facilities for farming and grazing. They are children, utterly unable to comprehend their own great necessities just ahead; they cannot, therefore, see that the country which now only furnishes them lodge-poles and a few antelope has abundant resources for their future wants, when they shall cease to be barbarous pensioners upon the Government and begin to provide for their own living. Their ignorance of themselves and of true values makes the stronger appeal to our sense of what is right and fair.

The true equivalent to be offered the Sioux, as helpless wards of the Government, for the Black Hills will be found by estimating what eight hundred square miles of gold fields are worth to us, and what three thousand square miles of timber, agricultural, and grazing lands are worth to them.

15. In December 1875 the President, in his annual message to Congress, recommended that, because of an anticipated large increase in emigration to the Black Hills, the Congress should "adopt some measures to relieve the embarrassment growing out of the causes mentioned." And, in this message, the President stated in part as follows:

> The discovery of gold in the Black Hills, a portion of the Sioux Reservation, has had the effect to induce a large emigration of miners to that point. Thus far the efforts to protect the treaty rights of the Indians in that section have been successful, but the next year will certainly witness a large increase of such emigration. The negotiations for the relinquishment of the gold fields having failed, it will be necessary for Congress to adopt some measures to relieve the embarrassment growing out of the causes named. The secretary of the interior suggests that the supplies now appropriated for the sustenance of that people being no longer obligatory under the treaty of 1868, but simply a gratuity, may be issued or withheld at his descretion.

16. The Secretary of Interior in his annual report to Congress for 1875 stated as follows:

The failure of the negotiations by the commissioners necessitates the adoption of some measures to relieve the department of the great embarrassment resulting from the evident determination of a large number of citizens to enter upon that portion of the Sioux Reservation to obtain the precious metals which the official report of the geologist sent out by the Government shows to exist therein. The very measures now taken by the Government to prevent the influx of miners into the Black Hills, by means of the display of military force, operate as the surest safeguard of the miners against the attacks of Indians. The army expels the miners, and, while doing so, protects them from Indians. The miners return as soon as the military surveillance is withdrawn, and the same steps are taken again and again. Some of the miners have brought suits against the military officers for false imprisonment, and much embarrassment to both army and the interior department is the result. The preliminary report of Professor Jenney, which accompanies the report of the Indian commissioner, in regard to the geological and agricultural wealth of the Black Hills, indicates clearly the great temptation held out to miners and emigrants to occupy that country, and will greatly enhance the difficulties which have already surrounded the question of protecting the Sioux in their treaty rights in that territory. The opening of the next summer season will undoubtedly witness a great increase of emigration thither, and the question urges itself upon the attention of the department and of Congress for early solution. It is true that the Indians occupy that reservation under the provisions of a treaty with the United States. It is also true, as a general proposition, that treaties should be maintained inviolate, and the Indians protected in their rights thereunder. But for two years the Government has been appropriating about one million two hundred and sixty thousand dollars for the subsistence of Sioux of various tribes, which amount is a gratuity that the Government is under no obligations to give them, and for which it receives no compensating advantage. The amount thus appropriated is 5 percent per annum of $25,000,000, which the Government is giving without an equivalent. This amount must be given them for some years to come, or they will starve. It is submitted, therefore, under these circumstances,

for the consideration of Congress, whether it would not be justifiable and proper to make future appropriations for supplies to this people, contingent on the relinquishment of the gold fields in the Blacks Hills and the right-of-way thereto.

17. The treaty of 1868 (finding 4), as its provisions show, contemplated that the Indians, with the assistance agreed to be rendered by the Government, would soon become self-supporting on the reservation. The United States agreed in that treaty to equip them for farming and to furnish them all needed facilities and assistance in that connection, to furnish them educational facilities for not less than 20 years, and for a period of 30 years to furnish each Indian with articles of clothing, etc., and to pay the sum of ten dollars for each Indian "while such persons roam and hunt," and twenty dollars "for each person who engages in farming" to be used for the purchase of such articles as from time to time the conditions and necessities of the Indians might indicate to be proper. In addition to all the other provisions of the treaty, the United States agreed, in article 10, to appropriate and expend annually such sum as might be necessary for the subsistence of the Indians of the Sioux Tribe on the reservation for a period of four years. This last-mentioned provision of the treaty was fulfilled and finally discharged by the appropriation and disbursement of $1,314,000 under the act of February 14, 1873, 17 Stat. 437, 456, for the fiscal year ending June 30, 1874. The total appropriated in fulfillment of the subsistence provisions under the treaty was $5,295,761.91. The Sioux Indians had not become self-sustaining and, notwithstanding there no longer remained any treaty obligation on the part of the Government to support the Indians, the Congress continued to appropriate and disburse public funds for their sustenance.

The act of June 22, 1874, 18 Stat. 146, 167, making appropriations for the year ending June 30, 1875, appropriated $1,100,000 for subsistence of the Indians of the tribe then numbering more than 30,000 persons. Likewise, under the act of March 3, 1875, 18 Stat. 420, 441, $1,100,000 was appropriated and disbursed for sustenance for the fiscal year ending June 30, 1876; and under act of April 6, 1876, 19 Stat. 28, a deficiency appropriation of $150,000 was made and disbursed for subsistence of the Sioux Indians for the fiscal year ending June 30, 1876. The total of these last-mentioned appropriations for food for the necessary

subsistence of the Indians of the Sioux Tribe was $2,350,000.

In the act of August 15, 1876, 19 Stat. 176, (p. 192), making appropriations for the current contingent expenses of the Indian Department for the fiscal year ending June 30, 1877, Congress made the necessary appropriations for fulfilling all the existing provisions of the Sioux Treaty of 1868, and, with reference to the matter of subsistence of the Indians of the Sioux Tribe, appropriated the further sum of $1,000,000, and with respect thereto, enacted as follows:

> For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided*, That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude and shall also grant right-of-way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement or arrangement shall have been entered into by said indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting.

18. August 24, 1876, the President appointed another commission to negotiate with the Sioux Tribe for the desired cessions and stipulations as provided in the act of 1876, *supra*. This commission proceeded to the Sioux country to conduct negotiations with the Sioux tribes and bands at the different agencies on the Great Sioux Reservation and submitted to them a proposed agreement conforming to provisions of the act of Congress; it duly explained to the Indians the intent, meaning, and effect of the act of Congress and the proposed agreement, in connection with the fact that the subsistence provisions of article 10 of the treaty of 1868 had long since been fulfilled and had become extinguished, and further stated to the Indians that there no longer rested upon the Government any obligation to appropriate and disburse large sums annually for their subsistence. The result was that the commission was unable to obtain the assent of three-fourths of the male adult Indians of the tribe to this proposed agreement. More than 90 percent of the Indians refused to assent. The chiefs, headmen, and less than ten percent of the male adult Indians of the tribe at the different agencies assented to and signed the agreement on dates ranging from September 20 to October 27, 1876.

The record of the negotiations of the commission with the Indians of the Sioux Tribe discloses and shows that it was impossible for the commission to arrive at an agreement in strict conformity with article 12 of the treaty of 1868 for the relinquishment or sale to the Government of the Black Hills for the reason that more than 90 percent of the Indians refused to sell or lease the Black Hills and relinquish their hunting rights to the Government at any price. The male adult members of the tribe over eighteen years of age constituted about 25 percent of the entire population of the tribe. Some of the Indians indicated a willingness to lease the mining rights in the Black Hills to the Government for a consideration of $70,000,000 or for full subsistence for every Sioux Indian (then numbered between 20,000 and 30,000 persons) from that date, so long as the tribe existed.

The record, as a whole, does not justify a finding that the chiefs, headmen, or the Indians of the Sioux Tribe who assented to and signed the agreement, which became the act of February 28, 1877, hereinafter mentioned, did so under duress, or that the commission used undue influence or imposed upon the Indians who did sign the agreement.

19. The agreement as thus consummated, which so far as the assent of the tribe was concerned was the best the Government could do in the circumstances, was, in due course, submitted by the commission, with its journal and minutes, to the President and by him transmitted to Congress on December 22, 1876 (Sen. Exec. Doc. 9, 44th Congress, 2d sess., Cong. Doc. Series 1718), with the statement that "I ask your especial consideration of these articles of Agreement as among other advantages to be gained by them is the clear right of citizens to go into a country of which they have taken possession and from which they cannot be excluded." In due course Congress made the agreement so transmitted a part of the act approved February 28, 1877, 19 Stat. 254, as follows: [Act omitted in printing and reproduced in full elsewhere in Appendix]

20. Thereupon, the $1,000,000 conditionally appropriated by Congress in the act of August 15, 1876, *supra*, for subsistence of the Indians for the fiscal year ending June 30, 1877, was expended and disbursed for that purpose, and Congress has, annually, ever since that time appropriated and is still appropriating so far as is necessary, in conformity with and in fulfillment of the provisions and stipulations of the act of February 28, 1877, as embodied in article 5, the sums necessary for subsistence of each individual of the Sioux Tribe.

By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation. The total of the sums annually appropriated by the Congress to June 30, 1926, in fulfillment of this purpose, for subsistence of the Indians of the Sioux Tribe, including the $3,055,450.53 for the fiscal years 1875 and 1876, was $39,993,962.50, for none of which any legal obligation rested upon the Government other than that assumed and provided for in the act of February 28, 1877. Amounts appropriated for subsistence subsequent to 1926 bring this total to approximately $43,000,000.

21. By the act approved March 2, 1889, 25 Stat. 888, 896, Congress directed that the Great Sioux Reservation should be divided into separate reservations of described metes and bounds; that all lands in the reservation (which reservation did not then include the Black Hills territory ac-

quired by the Government under the acts of August 15, 1876, and February 28, 1877,) outside the limits of the diminished reservation therein provided for should be restored to the public domain and sold or disposed of for the benefit of the Indians in the manner provided, and section 19 provided as follows:

> That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.

Section 28 provided "That this act shall take effect only upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void."

This act was accepted by the Indians of the Sioux Tribe as therein provided, and such acceptance was proclaimed by the President February 10, 1890, 26 Stat. 1554, as required.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant, by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and pro-

claimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851.

The record is voluminous, but there is no serious dispute concerning the essential facts pertinent to the legal phase of the claim presented as to what the Government did and the reasons therefor. Plaintiff Indians say that because article 2 of the treaty granted the property to them for their "absolute and undisturbed use and occupation" and that because the Government through an act of Congress in 1877 acquired the property without the consent of three-fourths of the male adult Indians having been first obtained, as provided in article 12 of the treaty, there was a "taking" of the property and a "misappropriation" thereof, and relies upon *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, and *United States* v. *Creek Nation*, 295 U.S. 103. The defendant says that the Congress acted within the scope of its plenary authority over Indian tribes, and relies upon *Lone Wolf* v. *Hitchcock*, 187 U.S. 553.

If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. But if, under the circumstances disclosed by the record, Congress acted within the limits of its authority under law and the treaty in acquiring the lands and hunting rights for which it made compensation, the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover.

The facts and circumstances narrow the legal issue between the parties to the question whether under the treaties of 1851 and 1868 and the act of February 28, 1877, the plaintiff tribe has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the Government, pursuant to which the acts of August 15, 1876, and February 28, 1877, were enacted, and the adequacy of the consideration assumed and paid by defendant for the property acquired under those acts. Section 1 of the jurisdictional act (41 Stat. 738) authorizes this court to adjudicate "legal and equitable" claims and to determine the amount, "if any, due said tribe from the United States" upon such legal and equitable claims "under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe."

The facts summarized show that by article 2 of the treaty of April 29, 1868, with plaintiff tribe, the Black Hills section of South Dakota here involved, and comprising about 7,345,167 acres, was included in the area set apart for the absolute and undisturbed use and occupation of the tribe, and, in addition, certain hunting privileges were granted by articles 11, 15, and 16 with reference to other lands. Under this treaty the Government assumed an obligation, among others, to provide food for the subsistence of all the Indians of the tribe for a period of four years. The population of the tribe was between twenty and thirty thousand. This obligation was fulfilled through the necessary appropriations annually for the term stipulated and was finally discharged by the appropriation of $1,314,000 on February 14, 1873, for subsistence for the year ending June 30, 1874,—the total amount appropriated for the four years being $5,295,761.95. After that no legal obligation rested upon the Government to expend public funds for subsistence of the tribe. The Indians were at that time incapable of supporting themselves.

It was known by the Indians that the Black Hills portion of the reservation contained some gold before and at the time the treaty of 1868 was made, but it was not known or believed by the Government that this area contained gold in paying quantities. The fact that the Black Hills contained gold was not known to the general public until after the results of the Custer Exploration Expedition into the Black Hills in the summer of 1874 had been published. Immediately thereafter there was a tide of emigration of settlers and miners to the Black Hills region in ever-increasing numbers. The Government, through the President and the military department, made serious efforts to prevent the intrusion and to expel the intruders, but these efforts were only partially successful. Public pressure for the opening of the Black Hills for settlement and mining became very strong. The situation in 1875 was such that the Government believed serious conflicts would develop between the settlers and the Government, and between the settlers and the Indians. In May 1875 a delegation of Sioux Indians was called to Washington for a preliminary discussion with the President, the Secretary of the Interior, and

the Commissioner of Indian Affairs looking to the cession or sale by the Sioux Tribe to the United States of the hunting rights outside the permanent reservation and the sale of the Black Hills portion of their reservation, (see finding 6). Later, a commission was appointed by the President, June 18, 1875, to continue negotiations in the Sioux country, but it was unsuccessful in its effort to negotiate terms for cession of the hunting rights and the Black Hills area to the Government and its mission failed. A full report was made to the President. In December 1875 the President, in his annual message to Congress, recommended that because of an anticipated large increase in emigration to the Black Hills, and the difficulties of the Government in that connection, the Congress should adopt some measure to relieve the embarrassment growing out of the causes mentioned, and the attention of Congress was brought to the fact that the last two annual appropriations for the fiscal years 1875 and 1876 (which amounted to $2,350,000) for the subsistence of the Indians of the Sioux Tribe had been made gratuitously, the treaty obligation having been discharged by the appropriation made in 1873 for the fiscal year 1874.

At that time the Government was having and continued, through 1876 and 1877, to have trouble with certain of the Sioux Indians, particularly Sitting Bull and Crazy Horse and their bands numbering about sixty lodges and approximately six hundred warriors, in connection with the survey and construction of the Northern Pacific Railroad through the hunting grounds of the tribe, and raids by those bands on white settlers and other Indians. On this account war between the Government and these bands and other unfriendly Sioux Indians developed in March 1876 and ended September 10, 1877, with heavy loss to both the Government and the Indians. This trouble and the military engagements between the Government and certain bands of the Indians from 1873 to 1877, inclusive, had no direct connection with the Black Hills matter.

In the act of August 15, 1876, making appropriations for the Indian Department for the year ending June 30, 1877, Congress, with full knowledge of the existing conditions, made a further appropriation of $1,000,000 for the subsistence and civilization of the Sioux Indians and provided therein that no part of that appropriation could be used, and that, thereafter, no appropriation for that purpose would be made, unless the Indians should relinquish all right and claim to hunt and roam on any country outside of

the boundary of the permanent reservation and release to the Government so much of their permanent reservation as lay west of the 103rd meridian of longitude, which was the Black Hills area, and should also grant rights-of-way over the reservation to the country thus ceded for wagon or other roads from convenient and accessible points on the Missouri River. This act also appropriated an additional amount of $200,000 to be expended by the President in carrying out those provisions. The President promptly appointed a commission to negotiate with the Sioux Tribe for the relinquishments, cessions, and stipulations required by the act. This commission proceeded to the Sioux country and negotiated and counseled with the chiefs, headmen, and the Indians at the various agencies within the reservation for their assent to an agreement of sale to the Government embodying the terms and conditions of the act of Congress, both of which were duly explained and interpreted to the Indians, and every effort was made to secure, in conformity with article 12 of the treaty of 1868, the assent and signatures of three-fourths of the male adult Indians of the tribe to the agreement. In this the commission was unsuccessful. The male adults constituted about 25 percent of the entire population of the tribe. As shown in the findings, more than 90 percent of the male adult Indians of the tribe refused to agree to sell the Black Hills and the hunting rights to the Government at any price; a small portion of the Indians expressed a willingness to lease only the mining rights in the Black Hills to the Government for $70,000,000 or subsistence for all members of the tribe so long as the tribe existed. Finally, the commission was able to obtain the assent and signature to the agreement of less than 10 percent of the male adult members of the tribe. The record of the negotiations between the commission and the Indians, which was laid before the President and the Congress, shows that anything more than what the commission accomplished was impossible through negotiations. The chiefs and headmen of the tribe assented to the terms of the act of 1876 and the provisions of the agreement which embodied them. The agreement, to the extent consummated by the commission, was transmitted by the commission to the President with the journal and minutes of the commission, and they were, in turn transmitted to Congress by the President for action. In due course the Congress embodied the agreement, so transmitted, in an act of both Houses, which act contained, among others, the requirements of the

act of August 15, 1876. This action was taken pursuant to the provisions of section 4 of the act of 1871, 16 Stat. 566, R.S. 2079—*Lone Wolf* v. *Hitchcock*, 187 U.S. 533, 556; *Choctaw Nation* v. *United States*, 119 U.S. 1, 27. It was approved by the President on February 28, 1877 (19 Stat. 254). The provisions of this act of 1877 have been in every respect fulfilled by the Government. Article 5 of the "Agreement" made the act of Congress provided that "Such rations [for subsistence of the Indians of the Sioux Tribe], or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves."

In addition to the total of $3,055,450 appropriated and disbursed for subsistence of the Indians for the fiscal years 1874 to 1876, the Government, under and pursuant to the provisions of the act of February 28, 1877, has appropriated and disbursed for the subsistence of the Sioux Indians a total of more than $39,000,000 to June 30, 1926. Additional appropriations subsequently made for the same purpose have brought the total to approximately $43,000,000—(finding 19). In addition to these appropriations, the act of 1877 gave the Indians about 900,000 additional acres of grazing lands.

Subsequently, by the act of March 2, 1889, Congress directed that the Great Sioux Reservation, as it then existed, be divided into separate reservations of stated metes and bounds and that the land within the reservation outside the limits of the delimited permanent reservation should be sold for the benefit of the Indians in the manner provided in that act. Section 19 of this act also provided that all the provisions of the treaty of 1868 and the agreement signed by certain of the Indians in September 1876 not in conflict with the act should be continued in force according to their tenor and limitation. By section 28 thereof it was provided that the act should become effective only upon acceptance by the Indians as provided in article 12 of the treaty of 1868, that is, by not less than three-fourths of the male adult Indians. The act was submitted to and duly accepted by the Indians and such acceptance was proclaimed by the President. See *Choctaw Nation* v. *United States*, *supra*, page 29.

[Portion of opinion omitted in printing]

A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876,and February 28, 1877, and

the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe."

Except for the fact that in this case Congress passed a special jurisdictional act providing a forum to which the tribe might present for adjudication any legal or equitable claim which it might have against the United States under and legally supported by any treaty, agreement, or law of Congress, the case at bar is almost identical on its facts and the treaty and statutory provisions with the case of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553. In that case, as here, the Government was unable to obtain the consent of three-fourths of the male adult Indians of the tribe to an agreement which the Congress, over the protest of the Indians and with the knowledge that it had not been assented to by the required three-fourths, embodied in an act of Congress notwithstanding the provisions of article 12 of the treaty. The acts in both cases were subsequently carried out by the Government.

In the case at bar the claim made by plaintiff for compensation as for a taking of its land and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868. This claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession. This is necessarily the sole ground upon which the claim could be made because there was no law of Congress relating to this claim granting plaintiff any rights which have not been faithfully fulfilled. The act of 1877 is not a law supporting the claim because everything that act promised had been given, and also because that statute was the act of the Government which gave rise to a claim of plantiff, if it has one, under the treaty of 1868.

In the *Shoshone* and *Creek* cases, *supra*, cited and relied on by plaintiff, there was, on the facts disclosed, an arbitrary taking by the Government without payment or the assumption of an obligation to pay any compensation, and it

was held that the lands of the Indians had been taken for a public purpose and under such circumstances as to give rise to an implied obligation under the Fifth Amendment to pay just compensation therefor. In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and h nting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay. There is, therefore, no room for the conclusion that under the act of 1877 Congress impliedly promised to pay more than what was specified therein. *Baker* v. *Harvey*, 181 U.S. 481, 492; *Blackfeather* v. *United States*, 190 U.S. 368, 373.

In other cases hereinafter mentioned the Indians were required against their will and consent to relinquish to the Government portions of their reservations for sale or disposition for their benefit, and these acts were sustained as being clearly within the authority of Congress to legislate with reference to control and disposition of Indian property.

As we shall hereinafter attempt to show, we think there is no difference in principle insofar as any legal claim of the plaintiff is concerned between the power or authority of Congress to do what it did in this case and our authority to pass upon the justness and fairness of what it did, and what was done in other cases without the consent of the Indians and contrary to the provisions of treaty stipulations. In other words, if in the case at bar Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated should be paid and which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, become self-supporting. Congress possessed the authority to take

the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof.

There was inherent in the treaty of 1868, as one of the necessarily implied conditions thereof, the undeniable right of Congress, if it deemed the interests of the Indians as well as those of the Government and the existing circumstances dictated or required, to legislate under the act of 1871 in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians. "The power of the general government over these remnants of a race once powerful, * * * is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes." *United States* v. *Kagama*, 118 U.S. 375, 383. *Lone Wolf* v. *Hitchcock*, supra, p.567. This was expressly recognized and stated by the court in *Choate* v. *Trapp*, 224 U.S. 665, in which, at pp. 670 and 671, the court said:

> There are many cases, some of which are cited in the opinion of the Supreme Court of Oklahoma *(Thomas* v. *Gay*, 169 U.S. 264, 271; *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565), recognizing that the plenary power of Congress over the Indian Tribes and tribal property cannot be limited by treaties so as to prevent repeal or amendment by a later statute. The Tribes have been regarded as dependent nations, and treaties with them have been looked upon not as contracts, but as public laws which could be abrogated at the will of the United States.
>
> This sovereign and plenary power was exercised and retained in all the dealings and legislation under which the lands of the Choctaws and Chickasaws were divided in severalty among the members of the Tribes. For, although the Atoka Agreement is in the form of a

> contract it is still an integral part of the Curtis Act, and, if not a treaty, is a public law relating to tribal property, and as such was amendable and repealable at the will of Congress. But there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law. *Reichert* v. *Felps*, 6 Wall. 160. The question in this case, therefore, is not whether the plaintiffs were parties to the Atoka Agreement, but whether they had not acquired rights under the Curtis Act which are now protected by the Constitution of the United States.

In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases cited *supra*, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith.

An inherent weakness in plaintiff's position and argument is the assumption that in every case and under every circumstance, insofar as the right of the Government to require or compel the Indians to dispose of their property is concerned, the Indians and the Government stand on an equality with respect to the authority of either to act without incurring legal liability when a treaty exists.

The case of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, involved a treaty of 1867 with the Kiowa and Comanche Tribes of Indians which set apart a reservation of land for their absolute use and occupation with a stipulation that no treaty for the cession of any portion or part of the reservation "shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians occupying the same." An act of Congress of June 6, 1900, embodied a so-called agreement for cession of certain land to the Government for allotment in severalty to which the Government had been unable to obtain the assent of the required three-fourths of the male adult Indians of the tribe. To that extent the "agreement" and the act of Congress were in conflict with article 12 of the treaty. When the proposed agreement was submitted to the Indians by the commission appointed for that purpose, they objected to the same and refused to assent to it, and only a portion, less than three-fourths,

signed it. When it was submitted to Congress the Indian Tribe protested against it to Congress, insisting that they had not consented to it as required by the treaty and that it was in conflict with the express provisions of the treaty. Notwithstanding this, the instrument was made the terms of an act of Congress pursuant to a policy deemed by Congress to be for the benefit of and in the interest of the Indians and the Government. Lone Wolf, who was joined by the members of the tribes, brought a suit in equity to enjoin the Secretary of Interior from carrying out the provisions of the act on the ground, among others, that it violated the property rights of the Indians under their treaty.

While it is true, in that case, the cession to the Government enforced by the act of 1900 was the surrender of lands for allotment to the Indians in severalty rather than a forced sale to or acquisition by the Government, as in the case at bar, nevertheless the court considered and announced certain principles with reference to the authority of Congress from considerations of necessity or policy to legislate contrary to treaty stipulations and with reference to the extent to which the court might inquire into the wisdom of the policy as being in the interest of the Indians. The court held, at p. 564, that "To uphold the claim would be to adjudge that the indirect operation of the treaty was to materially limit and qualify the controlling authority of Congress in respect to the care and protection of the Indians, and to deprive Congress, in a possible emergency, when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained." And, at p. 564 and 565, the court said: "Now, it is true that in decisions of this court, the Indian right of occupancy of tribal lands, whether declared in a treaty or otherwise created, has been stated to be sacred, or, as sometimes expressed, as sacred as the fee of the United States in the same lands. *Johnson* v. *McIntosh*, (1823) 8 Wheat. 543, 574; *Cherokee Nation* v. *Georgia*, (1831) 5 Pet. 1, 48; *Worcester* v. *Georgia*, (1832) 6 Pet. 515, 581; *United States* v. *Cook*, (1873) 19 Wall. 591, 592; *Leavenworth & c R.R. Co.* v. *United States*, (1875) 92 U.S. 733, 755; *Beecher* v. *Wetherby*, (1877) 95 U.S. 517, 525. But in none of these cases was there involved a controversy between Indians and the Government respecting the power of Congress to administer the property of the Indians. The questions considered in the cases referred to, which either directly or indirectly had relation to the nature

of the property rights of the Indians, concerned the character and extent of such rights as respected States or individuals. In one of the cited cases it was clearly pointed out that Congress possessed a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians. Thus, in *Beecher* v. *Wetherby*, 95 U.S. 517, discussing the claim that there had been a prior reservation of land by treaty to the use of a certain tribe of Indians, the court said (p. 525): 'But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. It is to be presumed that in this matter the United States would be governed by such considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race. Be that as it may, the propriety or justice of their action towards the Indians with respect to their lands is a question of governmental policy, and is not a matter open to discussion in a controversy between third parties, neither of whom derives title from the Indians.'" The court, at page 565, further stated that "Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government. Until the year 1871 [act of March 3, 1871, 16 Stat. 544] the policy was pursued of dealing with the Indian tribes by means of treaties, and, of course, a moral obligation rested upon Congress to act in good faith in performing the stipulations entered into on its behalf. But, as with treaties made with foreign nations, *Chinese Exclusion Case*, 130 U.S. 581, 600, the legislative power might pass laws in conflict with treaties made with the Indians." And the court said further, at page 566, that "The power exists to abrogate the provisions of an Indian treaty, though presumably such power will be exercised only when circumstances arise which will not only justify the Government in disregarding the stipulations of the treaty, but may demand, in the interest of the country and the Indians themselves, that it should do so. When, therefore, treaties were entered into between the United States

and a tribe of Indians it was never doubted that the *power* to abrogate existed in Congress, and that in a contingency such power might be availed of from considerations of governmental policy, particularly if consistent with perfect good faith towards the Indians."

And, finally, at p. 568, the court said:

> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts.

We think the principles thus announced by the court in the *Lone Wolf case* are applicable here under the facts and circumstances in this case and that the decisions in *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 304 U.S. 111, upon which plaintiff relies, and other similar cases hereinafter discussed, are distinguishable for the reason that in those cases Congress exercised an arbitrary power, either directly or by ratification, which deprived the Indians of their property without rendering, or assuming an obligation to render, compensation therefor. The claims involved in the *Creek* and *Shoshone* cases were clearly and unquestionably *legal* claims. Compare *Chippewa Indians of Minnesota* v. *United States*, 91 C. Cls. 97.

Subsequent to the opinion in the *Lone Wolf case*, a number of cases have been decided in which the principles announced in that case have been recognized and which announce the additional principle, which has now become well-established in cases brought under special jurisdictional acts, that the United States cannot, through Congress or otherwise, arbitrarily deprive the Indians of their lands or monies secured to them by a treaty or law of Congress, or to appropriate the lands of Indian tribes to its own purposes or give them to others without rendering or assuming an obligation to render just compensation therefor. In *United States* v. *Creek Nation*, 295 U.S. 103, the tribe brought suit in this court under a jurisdictional act to recover compensation for certain lands of its reservation of

which it had been deprived, without its consent, and for which it had not been paid. The court, at page 108, said:

> Counsel for the government, assuming that the present claim is merely for damages arising out of errors on the part of administrative officers, contend that it does not come within the terms of the jurisdictional act—"any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs, which said Creek Nation or Tribe may have against the United States." We think the contention is not tenable.
>
> Counsel's assumption ignores several elements of the claim, such as the treaties of 1833 and 1866 and the acts of Congress of 1889 and 1891. It also neglects matters reflecting a confirmation of the acts of the administrative officers, such as the receipt by the United States of direct and material benefits from their acts and its retention of the benefits with knowledge of all the facts.
>
> While the jurisdictional act is couched in general terms, there can be little doubt when it is read in the light of the circumstances leading to its passage that it is intended to include the present claim. The congressional committees on whose recommendation the act was passed were in possession of all data bearing on the claim. The facts had been laid before them in letters from the Secretary of the Interior, the Commissioner of Indian Affairs and the Commissioner of the General Land Office. * * * In view of this portrayal of the matter by the officers specially charged with the administration of Indian and public-land affairs, and the subsequent action of the committees in effecting the passage of the jurisdictional act, we regard it as reasonably manifest that the act is intended to provide for the adjudication of the present claim. The concessions made in the court below by those who were there representing the Government show rather plainly that they so understood the act.

The court, in discussing the question whether there had been a taking and the liability of the United States in connection therewith under the facts disclosed, at pages 109–111, said:

> A question is raised as to whether there was an appropriation or taking of the lands by the United States.
>
> The Creek tribe had a fee simple title, not the usual Indian right of occupancy with the fee in the United States. That title was acquired and held under treaties, in one of which the United States guaranteed to the tribe quiet possession. *The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe,* it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. It did not enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them; for that "would not be an exercise of guardianship, but an act of confiscation." *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294, 307–308.
>
> Such was the situation when the lands in question were disposed of under the act of 1891. The disposals were made on behalf of the United States by officers to whom it had committed the administration of that act, and were consummated by the issue of patents signed by the President. [Italics ours.]
>
> * * * * *
>
> We conclude that the lands were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe.

The case of *Klamath and Moadoc Tribes of Indians et al.* v. *United States,* 296 U.S. 244, involved a question of law as to the right of the Indians to recover because they had executed a release in connection with a payment which the Government had made for certain land, of which they had originally been deprived without their consent under an act of Congress in 1906, but the opinion of the court, in certain aspects, is pertinent here. In that case the Indians claimed that they were entitled to maintain suit to recover just compensation for 87,000 acres of land on the ground (1) that they had been deprived of this land contrary to the provi-

sions of a treaty and without their knowledge or consent (which was true); (2) that it was a legal and equitable claim within the meaning of the language of section 1 of the jurisdictional act; (3) that the consideration of $108,750 paid by the government therefor, pursuant to an act of Congress of 1908, was wholly inadequate (which was true); and (4) that they were not barred because of a release from recovering just compensation for the land by reason of a provision in section 2 of the jurisdictional act, which provided that any payment which had been made on any claim submitted to the court should not be pleaded as an estoppel but might be pleaded as an offset. This court had found that the fair value of the 87,000 acres of land, when taken in 1906, was $2,980,000. Interpreting section 1 of the jurisdictional act, the Supreme Court (p. 250) said:

> The meaning of the general language of section 1 that "all claims of whatsoever nature" which plaintiffs have against the United States "may be submitted" is limited by the clause "which have not heretofore been determined by the Court of Claims," and is further much narrowed by the definitions of the classes of claims meant to be included. And correspondingly restrained is the meaning of the phrase "all legal and equitable claims" in the clause conferring jurisdiction upon the court "to hear and determine." Thus the privilege of plaintiffs to submit and the power of the court to determine are made coextensive. The Act grants a special priyilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms. *Schillinger* v. *United States*, 155 U.S. 163, 166. *Price* v. *United States and Osage Indians*, 174 U.S. 373, 375. *Blackfeather* v. *United States*, 190 U.S. 368, 376.
>
> This claim is plainly not, within the meaning of section 1, for an amount due under treaty, agreement or law of Congress or for misappropriation of funds of the Indians. * * *

The court further said, at pp. 251, 252:

> Plaintiffs turn for support to the provision of section 2 which prevents "payment * * * upon any claim" from being pleaded as an estoppel but permits it to be asserted as an offset. And they insist that, if this clause does not relate to payments made and accepted as being in full, it means nothing. But that contention is

> based on a misunderstanding of the language used. Payment upon a claim means payment on account or in part as distinguished from one made and accepted as payment in full. The quoted provision made no grant of jurisdiction; it was inserted merely to eliminate defenses. Neither it nor any other part of section 2 may be held to add claims to those covered by the language of section 1. As jurisdiction will not be extended beyond the terms of the Act by any implication or other resort to construction, no force can be given to plaintiffs' suggestion that intention to include claims already settled and released is shown by the clause in section 2 allowing defendant credit for money it expended for plaintiffs.

In connection with the question whether the tribes had shown the release invalid, the court, at p. 252, said:

> The question is not whether under the circumstances disclosed the United States may set up the release as a defense. It is whether the special Act brings the claim within the court's jurisdiction. * * * It is to be remembered that the Act of April 30, 1908, was passed by Congress in the exertion of its untrammeled power in behalf of the United States to fix, as it deems appropriate and just under the circumstances, the amount of compensation to be paid the Indians for the rights of the plaintiffs lost by the taking of the 87,000 acres from their reservation. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306, 308. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565–566. *Choate* v. *Trapp*, 224 U.S. 665, 670–671. Cf. *United States* v. *Mille Lac Chippewas*, 229 U.S. 498, 506, 509–510. *United States* v. *Creek Nation*, *supra*, 110.

Finally, with reference to the inadequacy of the amount paid by the government for the lands which had been taken and the relationship between the Government and the Indians, the court, at p. 254, said:

> Plaintiffs say that the plain inadequacy of the payment, when taken in connection with the unequal positions of the parties, is enough without more to invalidate the release. The findings show that the amount paid plaintiffs was less than four percent of the value of the land. It was grossly inadequate. Where, in litigation be-

tween private parties, a release of claim is by the party who gave it challenged as invalid, inadequacy of consideration coupled with lack of business capacity and inferiority of position in respect of the transaction or in relation to that of the other party are elements having significance. *Wheeler* v. *Smith*, 9 How. 55, 82. *Thorn Wire Co.* v. *Washburn & Moen Co.*, 159 U.S. 423, 443. But the rules that govern in such cases have no application in suits by these Indian tribes against the United States. The relation between them is different from that existing between individuals whether dealing at arm's length, as trustees and beneficiaries, or otherwise. See *Choctaw Nation* v. *United States*, 119 U.S. 1, 28. *Lone Wolf* v. *Hitchcock*, *ubi*, *supra*. *Choate* v. *Trapp*, *ubi*, *supra*. Regard being had to the nature of duties, resembling those arising out of the relation of guardian and ward, owed by the United States to Indian tribes, and in view of the undoubted power of Congress to determine the amount and to fix the terms of payment of compensation for the rights lost to plaintiffs, it is clear that in the absence of specific authorization, they may not avoid the release given in accordance with the Act upon the ground that the payment was too small. That would enable them to question the laws of Congress in fields where because of the relationship referred to, they are supreme.

The obligation of the United States to make good plaintiffs' loss is a moral one calling for action by Congress in accordance with what it shall determine to be right. Save to the extent that Congress may authorize, the Government's dealings with Indian tribes are not subject to judicial review. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 567-568.

Subsequently, in 1936, Congress passed an additional jurisdictional act in the *Klamath* case authorizing the court to enter judgment upon the findings of fact theretofore made with the provision that any payment theretofore made to the Indians in connection with any release of settlement should be charged as an offset but should not be treated as an estoppel, and this court entered judgment on the basis of a value of $2,980,000, less the payment made and other allowable offsets, which judgment, with the addition of interest from 1906, as a part of just compensation, amounted to $5,313,347.32. 85 C. Cls. 451; affirmed 304 U.S. 119.

The case of *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, and *United States* v. *Shoshone Tribe of Indians*, 304 U.S. 111, on which plaintiff places chief reliance in support of its claim, was a case where the Government officials in 1878 arbitrarily took certain lands or rights therein of the Shoshone Indians for the benefit of another tribe without the consent, then or later, of the Shoshone Indians and, therefore, contrary to and in violation of the provisions of articles 2 and 12 of the treaty, and this action was subsequently ratified by Congress by an act ratifying an agreement of cession in connection with which the Shoshones were required to permit the Arapahoes to participate, and in the proceeds of which the Arapahoes were to share equally. In that case there was no acquisition of land by the Government from the Indians for a consideration deemed adequate, nor was there an acquisition in connection with or in pursuance of a policy or the exercise of a power deemed by Congress to be for the interest or welfare of the Indians, as well as the Government. In that case the Government did not undertake to render, or assume an obligation (except under the Fifth Amendment) to render compensation for the land of which the Shoshone Indians were deprived, or the money from the reservation of which they would be deprived by reason of the action taken. The land was therefore taken or misappropriated under the treaty and the Shoshone Indians had a legal claim for compensation therefor. In the first decision, 299 U.S. 476, 496, 497, the court held that there had been a taking of property of the Shoshone Tribe under the power of eminent domain and that "The fact is unimportant that the taking was tortious in its origin, if it was made lawful by relation" (*United States* v. *Goltra et al.*, 312 U.S. 203, 208, 209), and "The fact also is unimportant that it was a partial taking only, and that eviction was not complete", and that "Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. * * * Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages." Finally the court, recognizing the rule of the undoubted authority of Congress, which cannot be questioned in a legal proceeding, to deal with tribal property of the Indians in whatever way it deems to be for the best interests and welfare of the Indians, as well as of the Government, said:

Nor does the nature of the right divested avail to modify the rule. Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation * * * ; for that 'would not be an exercise of guardianship, but an act of confiscation'" *United States* v. *Creek Nation*, *supra*, [295 U.S. 103] p. 110; citing *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307–308. The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is "as sacred as that of the United States to the fee." *United States* v. *Cook*, *supra*, p. 593; *Lone Wolf* v. *Hitchcock*, *supra; Choate* v. *Trapp*, 224 U.S. 665, 671; *Yankton Sioux Tribe* v. *United States*, *supra*. Spoliation is not management.

In the case of *Chippewa Indians of Minnesota* v. *United States*, 88 C. Cls. 1, the Indians sued to recover interest on a trust fund, which fund and interest was provided for under an agreement between the Indians and the Government, but which fund was, before the expiration of the period stipulated in the agreement, expended and disbursed by direction of an act of Congress contrary to the provisions of the agreement that such fund would be held in trust an interest for fifty years. This court dismissed the claim on the ground that Congress possessed the authority to do what it had done without rendering the Government liable for continued payment of interest under the prior agreement, and that the Indians had no legal claim against the Government for the interest on the trust fund which they, otherwise, would have received. See 307 U.S. 1.

In the case at bar the United States, acting through the Congress in the exercise of authority which it clearly possessed to legislate for what it deemed to be for the best interest of the Indians, did not "misappropriate" plaintiff's land, nor did it "take" the land from the Indians and give it to another without compensation. The Government endeavored in every way possible during 1875 and 1876 to arrive at a mutual agreement with the Indians for the sale by the

Indians of a portion of their reservation to the Government in conformity with article 12 of the treaty of 1868. The Indians refused to sell. Thereupon the Congress, by the act of February 28, 1877, in effect, required the Indians to sell certain hunting rights and the Black Hills area of their reservation to the Government in return for a consideration of 900,000 acres of additional land and approximately one million dollars a year until such time as the Indians should become self-supporting, which consideration the Government, otherwise, was under no legal obligation to give. The exercise of this authority and the legality of it, insofar as the legal right of the Indians to question it is concerned, are, we think, no different in principle from the case where the Congress legislates for the cession, sale, or disposition of tribal property for benefit of the Indians in pursuance of a policy deemed to be in the interest of the Indians, as well as the government, without the consent of the Indians and in conflict with some provision of a treaty or agreement, or a prior law of Congress. The mere fact that the Government, in the case at bar, acquired the property outright, instead of in trust, for sale or disposition for the benefit of the Indians does not affect the legal principle which controls, and does not bring the claim for more money within the term of the jurisdictional act.

Plaintiff's position in substance is that one party to a proposed transaction cannot legally fix the terms or consideration and force the other party to accept them. This is true in transactions between private parties dealing at arm's length and on terms of equal authority, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms"—*Klamath and Moadoc Tribes of Indians et al.* v. *United States*, 296 U.S. 244, 250; *Price* v. *United States*, 174 U.S. 373, 375; *United States* v. *Mille Lac Indians*, 229 U.S. 498. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that

authority in the jurisdictional act. The provision in the first sentence of section 2 of the jurisdictional act that "any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset" is not a grant of jurisdiction (*Klamath Tribe* v. *United States*, *supra*), and therefore applies only to any payment which may have been made on any legal claim which comes within the scope of the terms of section 1 of the act.

The facts and circumstances of this case show that in 1876 and in 1877 the Congress, being confronted with a situation where there was perhaps a moral obligation, but no legal liability, to provide subsistence for the Indians for a long time to come, and the Government not being in the position at that time to develop for the Indians any portion of their reservation so that the Indians might provide for their own subsistence, considered and decided that it was in the interest of all concerned that the Indians should give something to the Government which it wanted and needed in connection with the carrying out of a governmental policy in return for the expenditure for the benefit of the Indians of large sums of public funds. It was then expending without obligation more than $1,000,000 a year. In these circumstances, and for the reasons hereinbefore stated, we are of opinion that plaintiff has no legal claim within the meaning of the jurisdictional act which is supported by any treaty, agreement, or law of Congress upon which this court is authorized to render a money judgment.

[Remainder of opinion omitted in printing]

In The United States Court Of Claims

THE UNITED STATES v. THE SIOUX NATION OF INDIANS, ET AL.

Appeal No. 16-74

Indian Cl. Comm. Docket No. 74-B
33 Ind. Cl. Comm. 151

[Decided June 25, 1975]

ON APPEAL FROM THE INDIAN CLAIMS COMMISSION

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, NICHOLS, KUNZIG, and BENNETT, *Judges*.

NICHOLS, *Judge*, delivered the opinion of the court:

This appeal of the Indian Claims Commission's interlocutory order of February 15, 1974, raises essentially the question whether by the Act of February 28, 1877, 19 Stat. 254, and otherwise, the United States took the Sioux Nation's property in the Black Hills, South Dakota, by the power of eminent domain, or by a course of unfair and dishonorable dealing not amounting to a constitutional taking. In the former case interest is awardable as a part of just compensation and that is the answer of the Commission. In the latter it is not, and that is ours. Appellant admitted on oral argument it was only here to contest the interest. The following colloquy occurred:

> Judge DAVIS: * * * The difference really is, whether the Tribes will be entitled to interest on whatever the valuation is? The Commission came up with
>
> Gov't. Atty.: 17 million dollars
>
> Judge DAVIS: Now, originally you were able to take it to wipe out the whole 17 million but now you're no longer able to do that?
>
> Gov't Atty.: Not on unconscionable consideration.
>
> Judge DAVIS: But now the whole difference is interest, whether they get paid the interest?
>
> Gov't Atty.: That's all we're arguing about.

The opinion below, 33 Ind. Cl. Comm. 151, reveals the facts giving rise to the instant claim. By the Treaty of April

29, 1869, 15 Stat. 635, 636, the United States confirmed in the Sioux Nation recognized title to all of the present South Dakota West of the Missouri River, and it agreed to keep unauthorized persons out. The Black Hills portion, acquired in 1877, contained 7,345,157 acres. In 1874 an exploration led by Lieutenant Colonel Custer discovered gold in this area. A large number of prospectors and miners thereafter entered it without consent of the Indians or other warrant of law, and pressure began to build to open the Black Hills to white settlement. At first the Army was stationed to keep the intruders out, but by motion of appellee, and without objection by appellant, we take judicial notice of certain documents which show that President Grant on November 3, 1875, secretly ordered the Army to make no further resistance to the miners going in. At the same time, he decided not to rescind orders theretofore issued forbidding them to occupy the Black Hills country, but in the absence of enforcement, this was ineffectual. The dependence of the Sioux on Government rations was relied on to prevent their making trouble.

The Government now decided to acquire the Black Hills from the Sioux, sending a Commission to negotiate, but it failed to reach agreement. In December 1875, the Government ordered all Sioux back to their reservation by January 31, 1876, or be treated as hostile. Those outside were hunting and could not return in time; nevertheless the Army was sent to commence military operations against them. The famous defeat of Custer occurred on June 25, 1876. Incensed by this, Congress attached a rider to the Appropriation Act of August 15, 1876, cutting off the Sioux rations until they ceded the Black Hills. Since they could not hunt, until they yielded they would starve.

The Commission was unable nevertheless to get more than 10% of adult male Sioux to agree to cession. This was fatal to a legal acquisition by agreement, since Article XII of the 1868 Treaty provided that no cession of any part of the reservation should be valid unless three-fourths consented.

Congress by Act of February 28, 1877, 19 Stat. 254, resolved the impasse by enacting into law the unratified agreement of September 26, 1876. This yielded up the disputed territory. It included provisions respecting a contemplated removal to Indian Territory, not here relevant. It undertook to educate the Sioux and gave them a right to specified rations until able to support themselves. They had

to remain impoverished to continue to enjoy the rations, a condition it seems they have satisfied down to the present day. There were also provisions for land allotments on the parts of the reservation not ceded.

Besides valuing the yielded land as of February 28, 1877 at $17,100,000, the Commission determined that the sum of $450,000 would compensate for the gold removed by miners before the taking date.

The instant claim has had a long history and, as an occasion for lawyers' work and effort, a distinguished one. For the Indians, it has been so far unrewarding. We consider it here to the extent necessary to evaluate appellant's *res judicata* defense.

By Act of June 3, 1920, 41 Stat. 738, the Congress provided a special jurisdiction for this court to adjudicate appellees' claims. It enacted:

> * * * That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States * * * may be submitted to the Court of Claims * * * for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or for lands of said tribe * * * or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims * * * to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.
>
> Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, * * *

The instant claim was presented as one among thirteen, and was dealt with, in a reported decision almost twenty-two years later. *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943). Whether this decision was on the merits, and thus *res judicata* of the claim, or any portion thereof, or whether it merely held the court had no jurisdiction, is the somewhat bizarre question the parties have debated, below and here, and which we must now decide. All the rest of the claims were also dismissed for one reason or another.

After passage of the Indian Claims Commission Act, 25

U.S.C. § 70 and ff., in 1946 the then counsel for the Tribe in 1950 resubmitted the Black Hills claim. The theory then was unconscionable consideration and dishonorable dealings under § 70a (3) and (5). It was assumed then that the 1942 decision did not bar these claims by *res judicata* or collateral estoppel because claims under paragraphs (3) and (5) were new causes of action that were moral in nature and not justiciable under the Special Jurisdictional Act of 1920. Defendant, however, stated in its answer that recovery was denied in the 1942 decision "for want of jurisdiction." Even if defendant had not altered its construction, obviously we would not take the parties' pleadings as binding us as to the meaning of our own reported decision. The Commission entered an order of dismissal and this court published an affirming opinion, 146 F. Supp. 229 (1956). The main reason for the position was that the consideration was not proven unconscionable because the Indians had persisted in trying to prove the value of the property taken from them by an improper method. The Indians by their then counsel admitted they had been paid more than the value of the property of the taking date.

The Indians at this point retained new counsel who obtained an order vacating our judgment of affirmance, for the Commission to reopen the proofs, and to reconsider its former decision if it saw fit to do so. 182 Ct. Cl. 912 (pub. in 1968). The Commission did reopen the proofs and we did receive a quantity of new evidence. In 1961 we denied a petition by the Government for mandamus to prevent the Commission allowing the Indians to file an amended petition and for other extraordinary relief. See, *Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 500 F. 2d 458 (1974).

Since the 1956 decision was withdrawn, we do not now treat it as determinative of anything.

The new decision of the Commission at 33 Ind. Cl. Comm. 151 (1974) is predicated on a theory of a taking by eminent domain, and the Commission would award interest as part of just compensation both for the land and for the pre-taking removal of gold by the miners. The Commission order contemplates a return of the case to it after our review for determination of offsets, but Congress later that year enacted in Pub. L. 93–494, 88 Stat. 1499, that there would not be any offsets for food, rations, or provisions. There are said to have been in contemplation not many other offsets. The Indians we hope are now near the end of the long and weary trail, but how much they realize on the

claim turns wholly or almost wholly on the interest question, as it will be obvious, that interest over almost 100 years would many times exceed the principal. If we disagree with the Commission as to its taking theory the findings would justify liability under § 70a(5). The want of fair and honorable dealings seems obvious and this theory will support the award for pre-taking gold removal as well, since under this clause, with an obligation to protect once assumed, injuries inflicted by third parties are compensable. *Aleut Community* v. *United States*, 202 Ct. Cl. 182, 480 F 2d 831 (1973); *Lipan Apache Tribe* v. *United States*, 180 Ct. C. 487 (1967).

In *United States* v. *The Goshute Tribe*, 206 Ct. Cl. 401, 512 F 2d 1398 (1975), we consider the basis of a dishonorable dealing award under the Act. If the dealings were dishonorable, we held an award under clause (5) to be allowable even though the Commission might have made an award under some other sections also. As we there pointed out, resort to that section simplifies things by avoiding the necessity to measure whether consideration was conscionable. As the Congress does not want the rations to be used as offsets, *a fortiori* they should not come into the case by way of measuring the conscionability of consideration. If such a measurement had to be made, obviously, we think, the value of the expectations of rations in 1877 would be the value to be considered, and it would be impossible to determine that value, antecedently considered, because the Indians would terminate their right to rations whenever they became prosperous. No one in 1877 could have foreseen that the Sioux would always be poor, as the Commission rightly says. Thus impossibility of measurement makes "unconscionable consideration" inapt as a basis for liability.

We mention this court's requirement for a "special relationship" in *Goshute*, if dishonorable dealings liability is found. We say "Such a 'special relationship' arises when United States officials tender a Treaty to Indians for adhesion." 206 Ct. Cl. at 407. A Treaty was tendered the Sioux for adhesion in 1876. However, breach of the obligation to protect the Indians' lands from unwanted intruders, as promised in the 1868 Treaty, reneged on another special relationship. The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history, which

is not, taken as a whole, the disgrace it now pleases some persons to believe.

The Commission's taking theory founders on the bar of *res judicata*. As if doubtful of its reading of the 1942 case, the Commission strained to find an abandonment of this defense by the Government. Defendant did say in its pleadings that we held we had no jurisdiction in 1942, but explains it meant we had no jurisdiction of claims that were moral and not legal. Until after the remand by this court, the claim was actively prosecuted on the new moral grounds created by the 1946 Act. The Government shows it gave clear notice that it relied on *res judicata* as to any matters properly before the 1942 court. After 1969, when it was clear the Indians relied on a taking theory, the defendant debated the theory in full reliance on the 1942 case. We think the Commission should have accepted the Government explanation of its pleadings, as do we. When it came to write its decision it was well aware the 1942 decision had not been stipulated out of the case. Our policy, and the Commission's, has been to be lenient with the Indians as to whether their original petition allegations, filed before the jurisdictional cutoff, stated the claim on which they were ultimately to recover. It will not do, in cases under the same Act, to trap the Government in pleading allegations that were at best, ambiguous.

It must be a rare thing for a court to write findings an an opinion totalling 76 pages in length, all just to say it has no jurisdiction. This is, however, the Commission's position as to our 1942 decision. Indeed, the Commission really imputes a gross impropriety to this court in making a whole series of positive pronouncements on the legal rights of the parties—in a case over which it holds no jurisdiction! The best refutation would be to set forth the opinion at least, *in toto*, but we cannot on such a scale reprint material already available, in face of our over-large printing bills. It is no longer possible to follow the old practice of making such extensive quotes from prior opinions, as used to be usual. In this instance the opinion to be quoted also contains numerous long quotes from opinions still earlier which of course are all also directly available. Therefore we assume the interested reader will obtain our 1942 opinion. We set forth the rationale of that opinion, as we understand it, and next take up the specific passages that are alleged to reveal an admission of no jurisdiction.

* * * * *

Since in 1942 this court did, rightly or wrongly, hold on the merits, in a cause it had jurisdiction of, that the Sioux did not have a valid claim against the United States on account of the taking of Black Hills, and since it also held it had no jurisdiction of moral claims relating to the same matter, and since in waiving other defenses the Congress did not waive *res judicata* defenses in the Indian Claims Commission Act, the Sioux are now restricted to moral claims under categories (3) and (5) of Sec. 70a, on which interest cannot be awarded as part of just compensation. The Congress which wiped out the rations offset could correct this situation also, but we are without the power to do so. On the ground of dishonorable dealings under category (5), the record made supports the Commission's Order except as to interest, but including the pre-taking removal of gold by miners. The cause is remanded for further proceedings consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED

DAVIS, *Judge*, dissenting in part:

I disagree with the court's holding that the decision in 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943), is *res adjudicata* of the Fifth Amendment taking claim now presented by the Sioux Nation.[1]

It is not easy to apply the general principles of former adjudication to this court's decision in 97 Ct. Cl., and both sides can readily cite different parts of that opinion which appear to support the respective positions. The key, as I see it, is that the 1942 court separated an Indian Fifth Amendment claim into two distinct parts—the first being whether there was any "taking" or "misappropriation" at all, and the other being the amount of compensation to be paid by the Government for the "taking." The court thought it had power, under the normal jurisdictional act, to determine the former issue but, in considering whether the constitutional measure of "just compensation" had been paid for the "taking", the court felt that it had no competence to weigh or take account of the consideration given the Indians by the United States unless the special jurisdic-

[1] I concur in the court's other rulings, including that the United States is not precluded from raising the defense of *res judicata*.

tional act so provided in explicit terms—which in this instance it did not. On this view, the court refused to assess at all the money or value given by the Government in exchange for the Black Hills. It would not decide, because it believed it could not, whether or not this consideration amounted to "just compensation."

The rule we apply today is quite different. In Indian Fifth Amendment cases, we now take account of, and assess, the consideration given by the United States in deciding whether "just compensation" has been given. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 390 F. 2d 686 (1968); *Klamath and Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 689 n. 25, 436 F. 2d 1008, 1017 n. 25, *cert. denied*, 404 U.S. 950 (1971); *Confederated Salish and Kootenai Tribes* v. *United States*, 193 Ct. Cl. 801, 805, 437 F. 2d 458, 459–60 (1971). For purposes of *res judicata*, the formal issue thus becomes whether this is simply a change, since 1942, in the substantive law of just compensation for Indians or whether it is attributable to a liberalized view of the authority given the courts by the jurisdictional statutes consenting to suit against the United States on Indian Fifth Amendment claims.

This is a difficult question to answer but I prefer the latter response—the so-called "jurisdictional" response[2]—mainly because, in my view, that is the stance taken, on the whole, by the 1942 court. The opinion repeatedly ties its refusal to assess or weigh the consideration (given by the United States) directly to the particular jurisdictional act. *See* 97 Ct. Cl. at 616 (this forms part of the court's opinion, as is made clear by the foreword, on the same page, to the findings of fact), 657–58, 658, 666, 668, 670, 681, 681–82, 682–83, 683, 685. The court also spends some time emphasizing the strict construction to be given to special jurisdictional statutes. *See* 97 Ct. Cl. at 663–65, 682. Implicit in the whole opinion seems to be the notion that, except where consent to suit is given without qualification for suits against Government corporations (97 Ct. Cl. at

[2] If the 1942 decision was based on a lack of jurisdiction in this court, under the then special jurisdictional act, to take account of the consideration transferred by the Government, *res judicata* is inapplicable because, in that case, the earlier court would have felt precluded by a lack of jurisdiction from delving into one of the significant elements of the Fifth Amendment claim. See A.L.I., Restatement of the Law Second Judgments, Tent. Draft No. 1, § 48.1 (1) (a), § 61.2 (1) (c), pp. 45, 123, 127–130 (1973).

664–65), there is both a general presumption against suability of the United States, and also a special presumption against opening up, for judicial scrutiny, Indian claims challenging a congressional policy deemed at the time to be for the welfare of the Indians (97 Ct. Cl. at 665). The court's position was that "when Congress has desired to open up [the latter type of] claims * * * it has used language clearly indicating that purpose" *(Ibid.)*.

This symbiotic relationship between the terms of the jurisdictional act and the court's right to inquire into the extent and adequacy of the consideration is brought out, I think, by two sections toward the close of the 1942 opinion. In one the court says (97 Ct. Cl. at 681–82):

> Plaintiff's position in substance is that one party to a proposed transaction cannot legally fix the terms or consideration and force the other party to accept them. This is true in transactions between private parties dealing at arm's length and on terms of equal authority, but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, *unless Congress has clearly granted to the Indians the right to do so* [emphasis added]. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms"—[citing cases]. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act.

The second excerpt reads as follows (97 Ct. Cl. at 683–84):

> In reaching this conclusion we have kept in mind the principle of law that while the government always has the right to take or appropriate any private property for a public use, if it does so, without claim of title and without compensation, there arises an implied contract under the Fifth Amendment, and, therefore, a legal claim for just compensation.* * * But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent

of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the property and affairs of the Indian tribes *and the extent to which consent to be sued has been granted* [emphasis added], as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show *not only* that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" [citing case] *but that Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly* [emphasis added].

True, the opinion speaks, in the first of these excerpts, of "a moral claim." But this seems to me to be because the court automatically equates claims which cannot be vindicated under the jurisdictional act—because that act should not be read as authorizing an inquiry into fairness of consideration—as necessarily "moral" claims. That does not mean that, in the court's eyes, these claims would fail under the Fifth Amendment if full consent had been given. The latter part of the second excerpt clearly separates the issue of a Fifth Amendment "taking" from that of an inquiry into fairness—and requires that Congress authorize *both* aspects. "The facts must show *not only* that there has been a 'taking' or 'misappropriation' by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make 'just compensation' [citing case], *but that* Congress has, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, *and* has authorized the court to determine, adjudicate, and render judgment accordingly" [emphasis added]. A separate, special authorization in the jurisdictional act to go into the fairness of the compensation seems to be required. The court, in a word, thought it had the jurisdiction to decide whether there had been a "taking" but no jurisdiction to

determine whether the compensation paid by the Government was "just."[3]

In the end, the best I can make of the 1942 opinion is that the terms of the jurisdictional act were so entangled in the court's mind with its ultimate determination adverse to the Indians on the Fifth Amendment claim that the Government should fail in its current defense of *res judicata*. The "jurisdictional" component seems to me to have been too large a factor in the 1942 holding to preclude the Nation from its right to show now that the acquisition of the Black Hills was a Fifth Amendment taking, without just and adequate compensation, rather than merely a violation of fair and honorable dealings. I am not persuaded that in 1942 the Indians had the opportunity to present their Fifth Amendment claim to a tribunal which deemed itself fully empowered to decide all aspects of that demand on their merits.[4]

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[3] The same theme seems to be reflected at the beginning of the opinion when the court says (97 Ct. Cl. at 657–58):

"If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, *without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking*, plaintiff is entitled to recover. But if, under the circumstances disclosed by the record, Congress acted within the limits of its authority under the law and the treaty in acquiring the lands and hunting rights *for which it made compensation*, the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover [emphasis added]."

Note that the court separates the case in which Congress pays no "compensation" from that in which it does pay some "compensation," without suggesting that the court can, under this jurisdictional act, decide whether the "compensation" paid just "just."

[4] Since the court does not reach the question of whether, *res judicata* aside, the acquisition would be such a "taking" without just compensation, I do not reach or discuss that issue.

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74-B

THE SIOUX NATION OF INDIANS
CONSISTING IN PART OF THE
SIOUX TRIBE OF THE ROSEBUD
INDIAN RESERVATION, SOUTH DAKOTA;
THE SIOUX TRIBE OF THE STANDING
ROCK INDIAN RESERVATION, NORTH AND
SOUTH DAKOTA; THE SIOUX TRIBE OF
THE PINE RIDGE INDIAN RESERVATION,
SOUTH DAKOTA; THE SIOUX TRIBE OF THE
CROW CREEK INDIAN RESERVATION, SOUTH
DAKOTA; THE SIOUX TRIBE OF THE LOWER
BRULE INDIAN RESERVATION, SOUTH DAKOTA;
THE SIOUX TRIBE OF THE CHEYENNE RIVER
RESERVATION, SOUTH DAKOTA; THE SIOUX
TRIBE OF THE SANTEE INDIAN RESERVATION,
NEBRASKA; AND THE SIOUX TRIBE OF THE
FORT PECK INDIAN RESERVATION, MONTANA,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: February 15, 1974

Appearances:

Arthur Lazarus, Jr., William Howard Payne, Marvin J. Sonosky, Attorneys for Plaintiffs.

Craig A. Decker, with whom was Assistant Attorney General Shiro Kashiwa, Attorneys for Defendant.

OPINION OF THE COMMISSION

Vance, Commissioner, delivered the opinion of the Commission. The plaintiffs have brought this claim under various clauses of Section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a (1970), seeking additional compensation for their lands and other interests obtained by the

United States under the Act of February 28, 1877, 19 Stat. 254. The plaintiffs have also amended their petition, by leave of the Commission, to include a claim for compensation for minerals removed from plaintiffs' lands by nonIndians prior to February 28, 1877.

BACKGROUND OF THE CLAIM AND ISSUES TO BE DETERMINED

The original petition in Docket 74 was filed by the plaintiffs on August 15, 1950. On April 5, 1954, after a trial and the filing of briefs by the parties, the Commission issued an order dismissing Docket 74. *Sioux Tribe of Indians* v. *United States*, 2 Ind. Cl. Comm. 646. This determination of the Commission was affirmed by the Court of Claims on July 7, 1956, 146 F. Supp. 229.

After obtaining new attorneys, the plaintiffs filed before the Court of Claims motions for a new trial and to vacate the court's judgment of affirmance. In support of their motions, plaintiffs alleged (1) that because of ineffective and inadequate counsel their claims had been decided by the Commission on the basis of an incomplete record; (2) that the Commission erred in not independently investigating their claims; (3) that some of the Commission's findings of fact were not supported by any evidence and (4) that plaintiffs' rights should not be prejudiced by an erroneous concession of fact by plaintiffs' prior counsel. The court granted the plaintiffs' motions to the extent it vacated its judgment of affirmance and remanded the case to the Commission with instructions that the Commission determine

> (1) whether the claimant Indian tribes are entitled on the basis of the statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive the additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter.

Sioux Tribe of Indians v. *United States*, App. No. 4-55 (Ct. Cl., Nov. 5, 1958).

In accordance with the court's instructions, on November 19, 1958, the Commission decided to reopen the proof in Docket 74 and announced that it would reconsider its pre-

vious decision. Subsequently, on November 4, 1960, the Commission allowed the plaintiffs to amend their petition, with the result that the claims based on the Act of February 28, 1877, 19 Stat. 254, were segregated into Docket 74-B, and the claims based on the Treaty of April 29, 1868, 15 Stat. 635, remained in Docket 74.

On October 29, 1968, the Commission ordered that three questions be set for determination in Docket 74-B, as follows:

> 1. What land and rights did the United States acquire from the Sioux by the Act of February 28, 1877, C. 72, 19 Stat. 254, 1 Kappler 168, and what were the exterior limits (a) of the land so acquired and (b) of the area subject to the rights so acquired?
> 2. Was there any consideration for defendant's acquisition of land and rights under the 1877 Act and, if so, what constituted such consideration.
> 3. If there was no consideration for defendant's acquisition of lands and rights under the 1877 Act, was there any payment for such acquisition?

In response to the first question, plaintiffs submitted a memorandum asserting that under the 1877 act the United States acquired:

> (1) The Black Hills portion of the Great Sioux Reservation containing about 7,345,157 acres, in which petitioners held recognized title pursuant to Article 2 of the Treaty of April 29, 1868, *supra* . . . .
> (2) The right of the Sioux under Article 11 of the 1868 Treaty "to hunt on any lands north of the [sic] North Platte, and on the Republican Fork of the Smoky Hill River, as long as the buffalo may range thereon in such numbers as to justify the chase . . . . "
> (3) The lands, interests in lands and other rights held by the Sioux north of the North Platte River and east of the summits of the Big Horn Mountains pursuant to Article 5 of the 1851 Fort Laramie Treaty and Article 16 of the 1868 Treaty . . . .
> (4) Three right-of-way for roads through the Great Sioux Reservation, and the right of free navigation along the Missouri River through the reservation. [Plaintiffs' Memorandum Defining Lands and Rights Acquired by the United States Under the Act of February 28, 1877, pp. 7-9).]

Plaintiffs' memorandum stated that the extent of the rights asserted in paragraphs (2) and (3) would be determined in Docket 74.

In its response to plaintiffs' memorandum, defendant acknowledged that it had obtained from plaintiffs the Black Hills portion of the Great Sioux Reservation, but denied that it had obtained any other compensable interest under the 1877 act.

In decisions entered in Docket 74 on July 8, 1970, *Sioux Tribe* v. *United States*, 23 Ind. Cl. Comm. 358, and in Documents 74 and 74-B on November 30, *Sioux Nation* v. *United States*, 24 Ind. Cl. Comm. 98, the Commission determined that under Articles XI and XVI of the 1868 treaty the plaintiffs had the right to hunt over certain territories described in the opinions. The Commission further determined that the plaintiffs could recover for the loss of these rights in Docket 74-B only if they could prove that the rights had a greater value in 1877 than when the plaintiffs obtained them. On December 29, 1970, plaintiffs notified the Commission that they did not intend to pursue their claims for loss of Articles XI and XVI hunting rights, and did not desire that a trial be set on the question whether any further compensation was due them for the loss of those rights."

The remaining issue under question 1 of the Commission's order of October 29, 1968—plaintiffs' claim based on the alleged acquisition by defendant of rights of way and the right to free navigation through plaintiffs' reservation—was not briefed by the parties until they were instructed to do so by the Commission's opinions of September 13, 1972, 28 Ind. Cl. Comm. 425, 430-31, and November 29, 1972, 29 Ind. Cl. Comm. 180, 184-86. That issue will be determined in this decision.

In response to questions 2 and 3 of the Commission's order of October 29, 1968, plaintiffs' submitted a memorandum asserting

> (1) that there was no "consideration" for the lands and rights which the United States acquired under the Act of February 28, 1877 . . . ; (2) that moneys expended by the United States under the 1877 Act were gratuities and were not payments on a purchase price for the lands the United States acquired pursuant to the 1877 Act . . . ; (3) that even if any new benefits conferred upon petitioners by the 1877 Act were treated as either consideration or payment for Sioux

lands, interests in lands and other rights, such consideration or payment (as the case may be) at a maximum consisted of the 1877 capitalized value of the Government's promises with respect to subsistence, less the 1877 capitalized value of the Government's unfulfilled obligations under the Treaty of April 29, 1868 . . . . [Plaintiffs' Memorandum Defining Consideration Paid by the United States Under the Act of February 28, 1877, pp. 11-12.]

In its reply to plaintiff's memorandum, defendant asserted that there was consideration for its acquisition of lands and rights under the 1877 act, which consisted of all monetary and property interests that passed from the defendant to the plaintiffs under the terms of the act. Defendant contended that through June 30, 1951, plaintiffs had received $52,139,223.93 in consideration, in addition to the 900,000 acre tract of land which they received under the 1877 act.

In its memorandum on the consideration issue, defendant also raised the issue whether the decision of the Court of Claims in *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943), bars the plaintiffs from asserting that the 1877 act constituted a Fifth Amendment taking of their lands. In their reply memorandum, plaintiffs asserted that the res judicata issue was raised prematurely, and did not respond to it.

On December 18, 1973, the Commission heard oral argument on the res judicata issue and the other issues presented in the parties' consideration memoranda. We shall determine all these issues in this decision.

Trial on the 1877 fair market value of the Black Hills portion of the Great Sioux Reservation was held in two parts, in November 1969 and May 1970. In this decision we shall determine the value of plaintiffs' land.

By its order of November 29, 1972, 29 Ind. Cl. Comm. 180, 187, the Commission permitted the plaintiffs to amend their petition to include a claim for compensation for minerals removed from the Great Sioux Reservation prior to February 28, 1877. In this decision we shall determine the extent of the liability, if any, of the United States for minerals removed from plaintiffs' land prior to its acquisition by the United States.

THE LAND ACQUIRED BY THE UNITED STATES UNDER THE ACT OF FEBRUARY 28, 1877

In Article II of the Treaty of April 29, 1868, 15 Stat. 635, 636, the United States confirmed in the Sioux Nation recognized title to a tract of land which became known as the Great Sioux Reservation, and which consisted mainly of all of the present State of South Dakota west of the Missouri River. Under the Act of February 28, 1877, the United States acquired from the Sioux the Black Hills portion of the Great Sioux Reservation, which is the subject area of the valuation in this decision. It contains 7,345,157 acres and may be defined as follows:

> Beginning at the intersection of the 103rd meridian of west longitude with the northern boundary of the State of Nebraska, then north along the 103rd meridian to the south fork of the Cheyenne River, then down the south fork to its junction with the north fork (Belle Fourche River), then up the north fork of the Cheyenne to the 103rd meridian, then north along the 103rd meridian to the 46th parallel of north latitude, then west along the 46th parallel to the 104th meridian, then south along the 104th meridian to the northern boundary of the State of Nebraska, then east along the northern boundary of Nebraska to the point of beginning.

The subject area is composed of two distinct topographic areas—the Black Hills and the surrounding plains. The Black Hills are a series of mountains ranging in elevation from 4,000 to more than 7,000 feet. There are four separate topographic divisions of the Black Hills. At the center is a core area known as the Crystalline Basin. It is surrounded by a plateau-like region known as the Limestone Plateau. Farther out from the center is the Red Valley, which is surrounded by a ring of high ground known as the Great Hogback Ridge. Outside of the Black Hills, the tract is typical Great Plains, with elevations ranging upward from about 2,000 feet, the lowest points being in the east.

The subject tract has a four season temperate climate with hot summers and cold winters. The mean annual temperature averages about 45°F. Average annual precipitation ranges from 11 to 18 inches on the plains, and from 16 to 30 inches in the Black Hills. In the winter this precipitation falls mainly as snow. The average growing season

ranges from 120 to 140 days on the plains, and from 100 to 120 days in the hills.

In general the tract is well watered. Several major rivers traverse the tract, as do many lesser streams and creeks. However, there are some areas on the plains where water supplies are intermittent, and where storage dams or wells have had to be constructed to provide adequate water for year-round stock raising.

The central core area of the Black Hills and the Limestone Plateau contain predominantly gray wooded soils. The mountainous areas and the Hogback consist mostly of rock outcrop with some lithosols. The Red Valley contains mainly chestnut soils. The plains area contains various types of chestnut soils, Regosols, and Solonetz. The soils are well to excessively drained and have a generally brown loamy surface.

The dominant types of grasses in the subject tract are true prairie grasses, such as June, Spear, and Wheat grass, and short grasses, such as Buffalo and Grama. Other grass varieties grow locally in different sections of the tract.

The Union Pacific-Central Railroad passed to the south of the tract. The closest stops were at Sidney, Nebraska, 120 miles from the tract, and at Cheyenne, Wyoming, 140 miles from the area. The Northern Pacific Railroad terminated at Bismarck, Dakota, which was about 120 miles northeast of the tract. In addition, a variety of stage-coach routes entered the subject area on or before the date of valuation. These lines ran to Deadwood, the major city in the tract, from Sydney, Nebraska; Cheyenne, Wyoming; Bismarck, Dakota; and southeastern Dakota.

HISTORY

Long before its acquisition from the Sioux by the United States, the potential value of the subject areas was known to Americans. During the 1850's and 1860's official government expeditions and private explorers and prospectors portrayed the Black Hills as an excellent potential agricultural and grazing area, and reported significant discoveries of gold.

In May of 1874 Lt. Colonel George A. Custer commanded an exploration expedition into the Black Hills. Members of the expedition discovered gold in paying quantities. The extent of the gold field, however, was not determined. Reports of the gold find were widely circulated and greatly exaggerated by the press. As a result of these reports, and despite a more pessimistic report by a later government explorer, large numbers of American prospectors and miners began to invade the Black Hills. In addition, pressure began to be asserted against the Government to open the Black Hills to white settlement.

In 1875 government officials decided that it would be advisable for the United States to acquire the Black Hills from the Sioux. In order to determine what would be a fair price to the Sioux for the Black Hills, President Grant ordered that a topographical and geological survey be conducted. He appointed Walter P. Jenney, a mining engineer, to head the survey. Jenney was instructed to report on the mineral, timber, and agricultural resources of the Black Hills. After completing his explorations, Jenney reported that he had discovered gold, that the gold field covered an area of not less than 800 square miles, that there was sufficient timber and flowing water for mining operations, that the soil in the area was rich and fertile, that at least one-twentieth of the Black Hills area was susceptible of cultivation, and that there were many other large areas which would afford fine grazing.

In June 1875, the Secretary of the Interior, acting under instructions from President Grant, appointed a commission to negotiate with the Sioux for the cession of the Black Hills and for the surrender of certain Sioux hunting rights. The commission, which became known as the Allison Commission, met with the Sioux during September 1875. The government negotiators offered a lower price for the Black Hills than the Sioux were willing to accept, and the negotiations ended in failure.

After the failure of the Allison Commission to reach agreement with the Sioux, the Grant Administration altered its policy. In November 1875 the President decided that the United States would no longer fulfill its obligation under Article II of the 1868 treaty to keep unauthorized persons out of the Great Sioux Reservation. He ordered that the Army be removed from the Black Hills, and that no further opposition be offered to miners attempting to enter the hills. In addition, President Grant, and members of his administration, began to assert pressure against Congress for unilateral action to acquire the Black Hills.

Without waiting for congressional action, the executive branch precipitated the Sioux situation into a crisis. On De-

cember 3, 1875, the Secretary of the Interior instructed the Commissioner of Indian Affairs to direct agents at all agencies in Dakota and at Fort Peck to notify the Sioux in the Yellowstone and Powder River areas in the unceded Indian territory[1] that unless they returned to their reservations by January 31, 1876, they would be declared hostile and would be treated accordingly by the Army. Most of the Sioux who were in the unceded territory during the winter of 1875–76 were hunting with the permission of their agents, as they had a right to do under Article XVI of the 1868 treaty. Furthermore, the severity of the winter made it impossible for them to return to their agencies. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been complied with, and that the Sioux were being turned over to the Army for appropriate military action.

In the spring of 1876 the Army commenced military operations against the Sioux. On June 25, 1876, the Seventh Cavalry, under the command of George A. Custer, was defeated in a battle with the Sioux, in which 259 soldiers, including Custer, were killed. When news of the battle reached Washington, Congress was so incensed that it attached a rider to the appropriation act of August 15, 1876, which provided that the Sioux would receive no further rations until they ceded the Black Hills to the United States. Because most of the Sioux had been disarmed and were thus unable to hunt, the provision meant that unless the Sioux surrendered the Black Hills they would be allowed to starve.

Despite the ultimatum contained in the appropriations act, the commission which was appointed to negotiate with the Sioux was unable to get more than 10% of the adult male Sioux to assent to a cession agreement. Article XII of the 1868 treaty provided that no cession of any portion of the Great Sioux Reservation would be valid unless approved by three-fourths of the adult male Sioux. Although the 1876 agreement did not satisfy the requirements of this section, Congress effectuated its terms by enacting the Act of February 28, 1877, *supra*.

[Portion of Opinion omitted in printing]

[1] Article XVI of the 1868 treaty provided that the area north of the North Platte River and east of the Big Horn Mountains was to be held and considered to be unceded Indian territory.

1942 COURT OF CLAIMS DECISION

Plaintiffs contend that the Act of February 28, 1877, *supra*, constituted a taking of the subject tract by the defendant under the Fifth Amendment without the payment of just compensation to plaintiffs. Defendant, on the other hand, argues that plaintiffs' Fifth Amendment claim is barred by the doctrine of res judicata, having been decided by the Court of Claims in *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943). For the reasons indicated below, we hold that plaintiffs' Fifth Amendment claim is not barred by the 1942 Court of Claims decision.

"In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits." *Hughs* v. *United States*, 71 U.S. (4 Wall.) 232, 237 (1866). As it is clear that the same parties are now before the Commission as were before the court in 1942, and that the court was faced with the same Fifth Amendment taking claim[8] as is the Commission, the only question to be answered in determining whether or not the 1942 decision bars plaintiffs' current claim is whether that case was decided on its merits.

Sioux Tribe, *supra*, at 657.

It is settled that the judgment of a court dismissing a suit for lack of jurisdiction is not a judgment on the merits and therefore does not bar a future suit on the same cause of action. *Smith* v. *McNeal*, 109 U.S. 426, 429 (1883); *Hughs* v. *United States*, *supra*; *Walden* v. *Bodley*, 39 U.S. (14 Pet.) 156, 161 (1840); *see General Investment Co.* v. *Lake Shore & Michigan Southern Ry*, 260 U.S. 261, 288 (1922). If, as plaintiffs argue, the Court of Claims dismissed their claim in 1942 for lack of jurisdiction plaintiffs are not barred from reasserting that claim.

The land claim in Docket 74–B is being litigated within the confines of the Amended Petition filed by plaintiffs on

[8] The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant, by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73, 781, 826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851.

November 1, 1960, and the Answer to the Amended Petition filed by defendant on June 28, 1966. The Commission's Order Designating Separate Docket Numbers, entered May 25, 1966. In paragraph 4 of their Amended Petition plaintiffs allege the following:

> The claim set forth herein accrued prior to August 13, 1946, and has never been adjudicated or otherwise acted upon by the United States or any agency thereof except as considered in *Sioux Tribe* v. *United States*, 97 C. Cls. 613 (1942), certiorari denied 318 U.S. 789 (1943). In that case, the Court of Claims ruled that it had no jurisdiction to decide this claim under the special jurisdicational Act of June 3, 1920, c. 222, 41 Stat. 738.

In paragraph 4 of its answer defendant responded specifically to plaintiffs' allegation as follows:

> Answering paragraph 4, defendant admits that the claim set forth in the amended petition accrued prior to August 13, 1946. Defendant also admits that a special jurisdictional act was passed June 3, 1920, 41 Stat. 738; *that an action was brought in the United States Court of Claims under that Act but that recovery was denied to the Sioux petitioners in that case because the Court of Claims ruled that it had no jurisdication to grant the relief requested.* Defendant admits the correctness of the citations reported but denies all other allegations of paragraph 4. [emphasis added.]

It is clear that in its answer defendant has admitted that in 1942 the Court of Claims dismissed plaintiffs' claim for lack of jurisdication.[9] Therefore the question whether plaintiffs' claim was dismissed on its merits or for lack of jurisdiction was resolved by the pleadings. Defendant is precluded from attempting to raise that issue now.

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[9] Defendant's only other reference to the 1942 decision in its answer is in paragraph 39, and reads as follows:

> On May 7, 1923, petitioners herein filed a petition in the Court of Claims against the United States pursuant to the jurisdictional act approved by Congress June 3, 1920, 41 Stat. 738, 4 Kappler 270, entitled *Sioux Tribe* v. *United States*, in which they sought to recover upon numerous claims, in a single action, including the claims asserted in the present amended petition. On May 7, 1934, petitioners severed their original petition and filed separate and amended petitions setting forth in Cause No. 1C-531-(7), 97 C.Cls 613 (1942), the same claims here involved. This action was contested by the United States. The Court of Claims, after a full hearing upon the claim, made findings of fact on all matters now presented by the amended petition although it found that it lacked jurisdiction to grant the relief requested. There is, therefore, no genuine issue of fact presented to this Commission for determination. All matters alleged were actually litigated and determined in *Sioux Tribe* v. *United States*, 97 C.Cls. 613 (1942) and cannot be relitigated in the present case. Petitioners are estopped by the prior factual determinations of the Court of Claims from relitigating the specific issues and factual presentations urged in their amended petition.

In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by the court in 1942. Nothing in this paragraph is inconsistent with defendant's prior admission in paragraph 4.

The Commission's reliance on defendant's admission does not result in any justice to defendant in this instance. A close examination of the court's 1942 decision reveals that the court did dismiss plaintiffs' claim solely on jurisdictional grounds and did not rule on the merits of the Fifth Amendment taking claim.[10]

In stating the issue before it, for example the court made it clear that it was concerned primarily with questions of jurisdiction. Thus in its introductory statement on page 616 it stated,

> The question now before the court under Rule 39 (a) is whether, as a matter of law, the plaintiff tribe has *a legal or equitable claim under section 1 of the Jurisdictional Act on which it is entitled to judgment under these treaties or any law of Congress for any amount due from the United States as for the misappropriation of any lands of said tribe*, or for the failure of the United States to pay said tribe any money for other property due under any treaties or laws of Congress. [Emphasis added.]

In again stating the issue before it on page 658 of its opinion, the court used the following language:

> The facts and circumstances narrow the legal issue between the parties to the question whether under the

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[10] At oral argument, defendant's counsel asserted that a comparison of the jurisdicational act under which the Sioux claim was brought with other special jurisdicational acts indicated that the Court of Claims did have jurisdiction over a Fifth Admendment taking claim. However, the issue whether the court in fact had jurisdiction over such a claim is not material to our determination. Our only concern in determining defendant's res judicata defense is whether the court itself believed that it had jurisdiction over plaintiffs' claim.

> treaties of 1851 and 1868 and the act of February 28, 1877, the plaintiff tribe *has any legal and enforceable claim within the meaning of section 1 of the jurisdictional act upon which the court has authority to inquire into the wisdom of the policy pursued by the government*, pursuant to which the acts of August 15, 1876, and February 28, 1877, were enacted, *and the adequacy of the consideration assumed and paid by defendant for the property acquired under those acts.* [Emphasis added.]

The questions before it, therefore, as seen by the court, were whether plaintiffs' claim was enforceable under the jurisdictional act, and whether under the jurisdictional act the court had the power to question congressional policy or the adequacy of the compensation promised by the defendant under the 1877 act.

Also, at the beginning of its opinion the court set out the requirements for recovery by plaintiffs. It was again speaking in jurisdictional terms. It stated,

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States *in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties*, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. *But if*, under the circumstances disclosed by the record, *Congress acted within the limits of its authority under the law and the treaty* in acquiring the lands and hunting rights for which it made compensation, *the plaintiff is not in our opinion entitled under the terms of the jurisdictional act to recover.* [p. 657–58, emphasis added.]

Thus, under the jurisdictional act, plaintiffs could not recover unless the acquisition of their property under the 1877 act was in violation of the 1868 treaty, and was outside the scope of congressional authority under the treaty and the law relating to Congress' control over Indian property. If Congress had the legal authority to acquire plaintiffs' property under the 1877 act, in the court's opinion, the jurisdictional act allowed for no recovery by plaintiffs.

After thus stating the issues before it, and summarizing the facts of the case, the court devoted more than two pages of its decision to discussing the law regarding waiver of sovereign immunity by Congress.

The court stated that special jurisdictional acts waiving such immunity must be strictly construed. It concluded that a court's jurisdiction to hear a claim must be found within the terms of its jurisdictional act, and that no suit could be maintained against the United States on a claim not clearly within the terms of that act.

The court then addressed itself specifically to the Sioux jurisdictional act.

> In the case at bar the jurisdictional act, except so far as concerned the competency of the Indian tribe to sue and the limitation on our general jurisdiction under section 259, title 28, U.S.C., as well as the statute of limitation, created no new right or claim in favor of the tribe not otherwise within the limitations of our general jurisdiction. *Green* v. *Menominee Tribe*, 233 U.S. 558, 570, 571. *Whitney* v. *Robertson*, 124 U.S. 190, 194, 195. [p. 666.]

The first of the cases cited by the court supports its conclusion that special jurisdictional acts do not create new causes of action, but rather merely permit tribes to sue. The second case it cited, however, *Whitney* v. *Robertson*, does not support this conclusion. Rather it stands for the proposition that Congress has the exclusive authority to determine whether the United States will continue to honor treaty commitments, and that the courts cannot be used as a vehicle to challenge congressional action on the grounds that that action violates previous treaties. When read in light of *Whitney* v. *Robertson*, the court's statement means that it interpreted the Sioux jurisdictional act as not giving it the power to question the judgment of Congress in violating treaty commitments to the Sioux.

The court next pronounced its holding in the case, using the following language:

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, *and the application thereof to the provisions of the jurisdictional act in the light of the established*

> *principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other* leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe."
>
> [p. 666, emphasis added.]

It was again talking in terms of the plaintiffs' right to recover under the provisions of the jurisdictional act.

In our opinion, the discussion which follows, on pages 667 through 669 of the opinion, is the key to the court's decision. The court stated as follows:

> In the case at bar the claim made by plaintiff for compensation as for a taking of its land and hunting rights is fundamentally predicated upon the provisions of articles 2 and 12 of the treaty of 1868. This claim is attempted to be sustained on the sole ground that the action of Congress, with the approval of the President, in requiring the tribe to give up a portion of its reservation and hunting rights to the Government was not in conformity with the provisions of article 12 of the treaty of 1868 with reference to the consent of three-fourths of the tribe to a cession. This is necessarily the sole ground upon which the claim could be made because there was no law of Congress relating to this claim granting plaintiff any rights which have not been faithfully fulfilled. The act of 1877 is not a law supporting the claim because everything that act promised has been given, and also because that statute was the act of the Government which gave rise to a claim of plaintiff, if it has one, under the treaty of 1868. [p. 667.]

It is clear from this paragraph that the court interpreted the jurisdictional act as giving it power only to hear legal claims against the United States, which claims must have been based on violation of legal rights possessed by the Sioux under treaties of laws of Congress. The court was saying that plaintiffs's claim must necessarily be based on Congress' violation of plaintiffs' alleged right, under Article XXI of the 1868 treaty, to refuse to cede their land, because that is the only right, granted by treaty or act of Congress, which could possibly have been violated by the

1877 act. It is apparent from this paragraph that the court did not believe it had jurisdiction to hear a claim based on violation of rights the Sioux possessed under the Constitution of the United States.

After a brief digression,[11] the court continued its discussion as follows:

> As we shall hereinafter attempt to show, we think there is no difference in principle insofar as any legal claim of the plaintiff is concerned between the power or authority of Congress to do what it did in this case and our authority to pass upon the justness and fairness of what it did, and what was done in other cases without the consent of the Indians and contrary to the provisions of treaty stipulations. In other words, if in the case at bar Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the

[11] On page 667, the court briefly distinguished the *Sioux* case from *Shoshone Tribe* v. *United States*, 229 U.S. 476 (1937), and *United States* v. *Creek Nation*, 295 U.S. 103 (1935). The court stated that in these two cases there was an arbitrary taking by the Government without payment or the assumption of an obligation to pay, and under such circumstances as to give rise to an implied obligation to pay just compensation. On the other hand, according to the court, in the *Sioux* case Congress in furtherance of a policy which it deemed for the best interest of the Sioux forced them to sell their property to the Government in return for what Congress deemed to be adequate consideration. In the *Sioux* case, the court concluded, "[t]here is, therefore, no room for the conclusion that under the act of 1877 Congress impliedly promised to pay more than what was specified therein. *Baker* [sic] v. *Harvey*, 181 U.S. 481, 492; *Blackfeather* v. *United States*, 190 U.S. 368, 373."

Neither of the cases cited by the court directly support its conclusion. Neither of them involved an alleged implied obligation to pay just compensation. At the cited page in *Barker* v. *Harvey*, the Supreme Court was discussing the fiduciary obligation owed by the Government to Indian tribes. The Court stated:

> But the obligation is one which rests upon the political department of the government, and this court has never assumed in the absence of Congressional action, to determine what would have been appropriate legislation, or to decide the claims of the Indians as though such legislation had been had. [181 U.S. at 492.]

In *Blackfeather*, the Supreme Court stated that moral obligations of the Government are for Congress to recognize and that courts have no jurisdiction over them. Reading the statement of the Court of Claims in light of the cases it cites, it is apparent that the court was deciding that because Congress specified the compensation to be paid under the 1877 act the court was without jurisdiction to conclude that there was an implied promise to pay any greater sum.

> interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which has been and is being paid, and will continue to be paid until the Indians, with the Assistance of the Government, become self-supporting. [p. 668, emphasis in the original.]

The court was saying that the *Sioux* case is controlled by decisions in other cases. These cases, according to the court, establish that with respect to plaintiffs' legal claim the jurisdiction of the court to pass on the justness and fairness of what Congress did in the 1877 act is determined by the authority of Congress to legislate as it did. Thus, if congress had the authority to do what it did—violate Article XII of the 1868 treaty—the court is without jurisdiction to question the justness or fairness of the 1877 act, and the plaintiffs have no legal claim which the court can adjudicate under the terms of the jurisdictional act.

Relying on *United States* v. *Kagama*, 118 U.S. 375 (1886), *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), and *Choate* v. *Trapp*, 224 U.S. 665 (1912), the court then decided that inherent in the 1868 treaty, as an implied condition, was the right of Congress to legislate as it saw fit with respect to the Sioux, even if such action was in violation of the specific provisions of the treaty. The court then concluded that "[i]n essence, therefore, the present claim is moral, rather than legal . . . ." p. 670. The court's reasoning in reaching this conclusion, although not specifically stated, must have been as follows: A legal claim by plaintiffs could be based only on a right they allegedly possessed, under Article XII of the 1868 treaty, to refuse to cede their land. However, under the 1868 treaty Congress had the inherent power in effect to force plaintiffs to cede their land. Therefore plaintiffs did not have the treaty right to refuse to cede their land, and the acquisition of their land by the United States without their permission could not be the basis for a legal claim under the jurisdictional act.

The court devoted the remainder of its opinion to a discussion of what it described as plaintiffs' "moral claim." It concluded that it had no jurisdiction to hear this claim. The court's language, as shown in the following quotations, clearly establishes that it was ruling solely on jurisdictional grounds:

> In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgment upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases [*Price* v. *United States and Osage Indians*, 174 U.S. 313], and other cases cited, *supra*, was not conferred by the jurisdictional act. We must presume in the circumstances of this case that Congress acted in good faith. [p. 670.]
>
> We must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made, and that the legislative branch of the Government exercised its best judgment in the premises. In any event, as Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which prompted the enactment of this legislation. If injury was occasioned, which we do not wish to be understood as implying, by the use made by Congress of its power, relief must be sought by an apppeal to that body for redress and not to the courts. [p. 673, quoting *Lone Wolf* v. *Hitchocock*, *supra*, 187 U.S. at 568.]
>
> . . . but this legal proposition does not follow in dealings between the Government and Indian Tribes so as to enable the Indians to question in a legal proceeding the policy, wisdom, or authority of Congress, unless Congress has clearly granted to the Indians the right to do so. In our opinion this has not been done for "the [jurisdictional] act grants a special privilege to the plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms" [citations omitted]. To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgment and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the Jurisdictional act. [p. 682.]
>
> . . . But before this general rule is applicable to Indian cases, consideration must be given to the question of policy and the extent of the plenary authority of Congress to legislate in such a way as it deems proper with reference to the management and control of the

property and affairs of the Indian tribes and the extent to which consent to be sued has been granted, as well as to the circumstances and conditions under which an implied contract will arise under the Fifth Amendment. The facts must show not only that there has been a "taking" or "misappropriation" by the Government of land or property of the tribe under such circumstances as will give rise to an implication of a promise or undertaking to make "just compensation" [citation omitted], but that Congress had, by the jurisdictional act, which speaks only of legal claims, opened up the question of the fairness of what was done or of the adequacy of the consideration paid, and has authorized the court to determine, adjudicate, and render judgment accordingly. [citation omitted.] [p. 683–84.]

The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented . . . . In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [citation omitted]. This phase of the claim clearly was not considered by Congress when the jurisdictional act was enacted and we cannot consider and adjudicate it unless and until Congress has unmistakably indicated its intention that we should do so. [p. 685.]

The court concluded it opinion with an analysis of the legislative history of the jurisdictional act, which it found sustained its ruling that it was without jurisdiction to grant plaintiff any relief.

Our conclusion that the court dismissed plaintiffs' claim for lack of jurisdiction is further supported by an examination of defendant's brief before the court, plaintiffs' motion for a new trial, and defendant's brief in response thereto. In its brief defendant set out the jurisdictional limitations which faced the court in dealing with plaintiffs' claim. It argued that the court was constrained to assume that Congress acted in good faith and exercised its best judgment; that the court was without jurisdiction to question the exercise of legislative power; and that if plaintiffs were in fact injured by congressional action it was from Congress rather than the courts that they must seek relief. Specifically with regard to plaintiffs' allegation of inadequate compensation, defendant stated,

> Needless to say, there is no specific or even implied authorization given in the jurisdictional act which would enable the plaintiffs to raise the issue of inadequacy of consideration. The grant of jurisdiction in this case is over claims arising *under* treaties, agreements, or laws of Congress, and not over claims in *contravention* thereof. [Vol. 922 Court of Claims Printed Record, Docket C-531-(7) p. 582. Emphasis in original.]

It is clear that defendant was urging the court to refuse jurisdiction over plaintiffs' claim.

In its motion for new trial, filed July 28, 1942, plaintiffs asserted only one error of law in the court's opinion—the court's holding that it had no jurisdiction to grant any relief to plaintiffs. Plaintiffs argued that the jurisdictional act did give the court jurisdiction to determine whether plaintiffs had been paid just compensation for their lands. In its brief in response to plaintiffs' motion defendant argued that the court was correct in dismissing plaintiffs' claim for lack of jurisdiction. Thus, immediately after the court's decision both parties were of the belief that the case had been decided on jurisdictional grounds.

The court itself, only four months after its decision, stated that the *Sioux* case had been decided on jurisdictional grounds. In *Winnebago Tribe of Indians* v. *United States*, 100 Ct. Cl. 1 (1942), a just compensation claim was brought under a jurisdictional act similar to that under which plaintiffs had filed their claim. In its opinion, decided by Judges Whitaker, Madden, Jones, Littleton, and Chief Justice Whaley—the same five judges who had decided the *Sioux case*—the court stated,

> . . . Congress, acting as the guardian of an Indian Tribe, has the power to take from it one reservation and to give to it another, if it thinks that this is for its best interest, and in the absence of express Congressional authorization this Court has not the power to determine whether or not just compensation was paid for the one taken. We went into this entire question in great detail in an opinion rendered through Judge Littleton in the case of *Sioux Tribe of Indians* v. *The United States*, No. C-531-(7), decided June 1, 1942. In that opinion the whole question was carefully and exhaustively discussed. The decision in that case is de-

terminative of the case at bar. (97 C. Cls. 613; certiorari denied, 318 U.S. 789.) [100 Ct. Cls. at 6.]

We conclude that *Sioux Tribe* v. *United States*, *supra*, (97 Ct. Cl. 613), was not decided on its merits. Plaintiffs' Fifth Amendment taking claim is therefore not res judicata and may be asserted here.[12]

Having decided that the 1942 Court of Claims decision does not bar plaintiffs' Fifth Amendment claims, the Commission must still determine the collateral estoppel effect, if any, of that decision. Defendant argues that the Commission is bound by all the factual determinations made by the Court of Claims and cannot readjudicate them. Plaintiffs, on the other hand, argue that because the court did not have jurisdiction over their claim none of its factual determinations are binding in this litigation. The Commission concludes that neither of the parties' contentions is correct.

It is a general principal that a court of competent jurisdiction always has the power to determine its own jurisdiction over cases before it. *See Stoll* v. *Gottlieb*, 305 U.S. 165, 171 (1938); *Texas & Pacific Ry.* v. *Gulf, Colorado & Santa Fe Ry.*, 270 U.S. 266, 274 (1926); 1B *Moore's Federal Practice* ¶0.405 [.4-1], at 641] (1965). It follows that the Court of Claims had the power to determine the extent of its jurisdiction to grant plaintiffs the relief they were seeking. Necessarily, it also had jurisdiction to make those factual determinations essential to its jurisdictional decision. Thus, the rule that determinations of a court lacking jurisdiction are void and not binding is not controlling here.

On the other hand, it does not follow that all of the factual determinations made by the court are binding on the Commission. In order that collateral estoppel apply, the following requirements must be met: the issue sought to be determined must be the same as that involved in the prior

[12]As an alternative ground for rejecting defendant's res judicata defense, we note that defendant's sole reference to the 1942 decision in its answer, aside from its admission in paragraph 4, was in paragraph 39, quoted in footnote 9, *supra*. In this paragraph defendant is alleging that plaintiffs are collaterally estopped from relitigating any of the facts found by the court in 1942. Defendant is not alleging, in paragraph 39, that plaintiffs' claim is res judicata by virtue of the 1942 decision, nor does it make such allegation elsewhere in its answer. Under sections 11(b) and 11(h) of the Commission's General Rules of Procedure, promulgated July 4, 1947, and which were in effect when defendant filed its answer in Docket 74-B, defendant's failure to affirmatively plead the defense of res judicata constitutes a waiver of that defense. Defendant is therefore precluded from asserting that defense now.

litigation; it must have been actually litigated in the prior litigation; it must have been judicially determined in the prior litigation; and the determination of the issue must have been essential to the judgment in the prior litigation. *Moore*, *supra*, ¶0.443. No factual determination made by the court in 1942 is binding on the Commission unless it satisfies all of these requirements.

In adjudicating plaintiffs' Fifth Amendment claim we are concerned with three issues: (1) whether in acquiring plaintiffs' lands under the 1877 act Congress made a good faith effort to give the Sioux the full value of their lands *(see Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543, 340 F. 2d 686 (1968), discussed *infra*); (2) the amount of compensation paid by the United States for plaintiffs' lands; and (3) whether that payment constitutes just compensation for plaintiffs lands. We are of the opinion that none of these issues was conclusively determined by the court's decision.

The issue whether Congress made a good faith effort to give the Sioux full value for their lands was not decided by the Court of Claims in these exact terms. To determine whether plaintiffs are nevertheless estopped from urging that Congress did not make such an effort the Commission must determine whether such a contention is necessarily inconsistent with the court's adjudication of any material and litigated issue before it. *See Moore*, *supra*, ¶0.443 [2], at 3903-04. We have been unable to find any such adjudication.

Initially, we doubt whether the court could have made any determination inconsistent with plaintiffs' contention. Under the court's interpretation of the Sioux jurisdictional act it lacked the power to question whether Congress was acting in good faith. At two points in its opinion the court specifically stated that it must *presume* that Congress acted in good faith. See pages 670 and 673 (quoting *Lone Wolf* v. *Hitchcock*, *supra)*. Furthermore, even if the court was not precluded from doing so by its ruling on its jurisdiction, it in fact made no determination which would preclude plaintiffs' theory of recovery.

We have examined the 21 findings of fact entered by the court. We have found no factual determination relating to an effort (or lack thereof) by Congress to give plaintiffs the value of their land. In examining the court's opinion we have found only two recitations that might possibly relate to this issue. The first is on page 667. The court said,

> In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay.

The crucial words here are "pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians," and "for that which the Congress . . . deemed to be adequate consideration for what the Indians were required to give up . . . ." The first phrase does not relate to an attempt to give full value. It means only that Congress believed that restricting the Sioux to a smaller reservation would aid them in adapting themselves to farming and herding as means of subsistence, and that removal of the Black Hills from the reservation would allow the Sioux to live free from the costly warfare with white miners. The second phrase means only that Congress through the payments it pledged were adequate compensation for the Sioux lands. It is not a determination that Congress attempted to measure these payments against the value of the Sioux lands. Certainly in both the school land portion of the *Fort Berthold* litigation *(Three Affiliated Tribes, supra,* 182 Ct. Cl. at 558–60), and in the *Confederated Salish* case *(Confederated Salish and Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 437 F. 2d 158 (1971)), Congress deemed what it paid for the Indian lands to be adequate consideration. This fact did not preclude the court in either case from concluding that Congress did not make a good faith effort to give the Indians what their land was worth.

The second possibility binding determination is on page 668. There the court stated,

> Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof.

Again, the court's finding that the 1877 act was pursuant to a policy which Congress believed to be just and in the interest of the Sioux is not inconsistent with plaintiffs' contention that Congress did not in good faith attempt to pay the Sioux the full value of their land. The court's conclusion that there was no misappropriation of plaintiffs' lands, in the context of the paragraph and the entire opinion, means only that the 1877 act was not an arbitrary seizure of plaintiffs' lands.

As the question whether Congress made a good faith effort to give the Sioux the full value of their lands was not at issue and was not judicially determined in the Court of Claims litigation, plaintiffs are not collaterally estopped from arguing that Congress did not make such an effort.

Defendant argued that the Court of Claims in its 1942 decision determined the amount of "consideration" that had been paid under the 1877 act through June 30, 1926, and that the Commission is bound by that determination. In its finding of fact 20 the court found as follows:

> By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence "until the Indians are able to support themselves" in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation. The total of the sums annually appropriated by the Congress to June 30, 1926, in fulfillment of this purpose, for subsistence of the Indians of the Sioux Tribe, including the $3,055,450.53 for the fiscal years 1875 and 1876, was $39,993,962.50, for none of which any legal obligation rested upon the Government other than that assumed and provided for in the act of February 28, 1877. Amounts appropriated for subsistence subsequent to 1926 bring this total to approximately $43,000,000.

The Commission is of the opinion that it is not bound by this finding of the court.

As we have stated above, collateral estoppel does not apply unless the issue sought to be determined was actually litigated in the prior litigation. As the Sioux decision was

entered under the court's Rule 39(a), which limited the issue to the plaintiffs' right to recover,[13] the questions actually litigated in that stage of the case can be found in the parties' briefs and proposed findings. We have carefully examined the briefs and proposed findings of fact submitted to the Court of Claims by the parties. Neither party proposed any finding of fact relating to the amount of "consideration" that had been paid under the 1877 act. Neither party in their brief made any reference to the "consideration" paid under the act. We must conclude that the "consideration" issue was not litigated before the court and that collateral estoppel does not apply to the court's findings on this issue.

On page 685 of its opinion the court stated, "In the absence of a clear grant of authority by Congress, we have no jurisdiction . . . to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender." The court accordingly did not determine whether what Congress agreed to pay under the 1877 act constituted just compensation for plaintiffs' lands. The Commission is therefore free to make its own determination on this issue.

FIFTH AMENDMENT TAKING

In dealing with Indian property, Congress can act in either of two capacities. First, it can exercise a guardianship over the property, derived from its constitutional power over Indian affairs. Secondly, it can exercise its eminent domain power and take the property, in which case it must pay just compensation. *Klamath and Modoc Tribes* v. *United States*, 193 Ct. Cl. 670, 684–85, 436 F. 2d 1008, 1015 (1971); *Three Affiliated Tribes*, *supra*, 182 Ct. Cl. at 552–53. In the *Fort Berthold* case the court set out the proper guideline to be used in determining which of its two

[13] *Rule 39(a)*

In every Indian case unless otherwise ordered by the Court or stipulated by the parties, the hearing in the first instance shall be limited to the issues of fact and law relating to the right of the plaintiff to recover, and the Court shall enter its judgment adjudicating that right. If the Court holds in favor of the plaintiff, the judgment shall be in the form of an interlocutory order, reserving the determination of the amount of the recovery and the amount of offsets, if any, for further proceedings. After the entry of such an interlocutory order, either party may move for a new trial under the provisions of Rules 91 to 97, inclusive. [This rule was promulgated by the court on May 1, 1939, as an amendment to its 1936 Rules.]

powers Congress has used in dealing with Indian property. If Congress has made good faith effort to give the Indians the full value of their land, there has been no taking. Congress has merely performed the traditional fiduciary function of transmuting property into money. If, on the other hand, Congress has failed to make such an effort, there has been a taking, and the United States can be liable if just compensation was not in fact paid. *Three Affiliated Tribes*, *supra*, 182 Ct. Cl. at 553. Application of this guideline to the facts of this case leads the Commission to conclude that the 1877 act constituted a taking of plaintiffs' property.

An examination of the terms of the 1877 act makes it clear that Congress made no effort to give the Sioux the full value of their land. the major obligations undertaken by the United States under the act are set out in Article 5, which we have quoted in finding of fact 81. In this article the United States agreed, with some conditions: (1) "to provide all necessary aid to assist the said Indians in the work of civilization;" (2) "to furnish to them schools and instruction in mechanical and agricultural arts, as provided by the treaty of 1868;" and (3) "[t]o provide the said Indians with subsistence . . . until the Indians are able to support themselves." The first of these promises was stated in such general terms that it is impossible to ascertain its value. The second promise, as it states, was not a new obligation on the part of the United States. Rather it was a reaffirmation of an obligation already owed under the 1868 treaty.

The third promise—to feed the Sioux—is the only promise that might have some relationship to the value of the property acquired by the United States from the Sioux under the act. However, this obligation was undertaken subject to several conditions. First, no rations were to be supplied unless the Sioux fulfilled every obligation thrust upon them by the act. Second, rations were to be furnished only until the Sioux were considered able to support themselves. Third, no rations were to be supplied to children between the ages of 6 and 14 unless they attended school. Fourth, no rations were to be supplied by any Sioux located on lands suitable for cultivation unless those Indians also provided labor. Given these conditions, it was impossible to determine, at the time the 1877 act was enacted, the extent of the obligation being undertaken by the United States in exchange for the Sioux property. In short, the amount of money, if any, which the United States was obligated to spend under Article 5 of the act was indefinite and uncer-

tain. The obligation undertaken by the United States under Article 5 clearly had no relationship to the value of the property it was acquiring from the Indians. Moreover, there is no indication in the record that Congress attempted to relate it to the value of plaintiffs' land.

We conclude that Congress did not make a good faith effort to give the Sioux the full value of their property. Congress was therefore not acting as guardian for the Sioux with respect to this property, but was exercising its power of eminent domain in order to allow Americans to freely use the subject area. We hold that the Act of February 28, 1877, *supra*, constituted a Fifth Amendment taking of plaintiffs' property.

COMPENSATION

As we have already indicated, the 1876 agreement did not comply with the terms of the 1868 treaty. It therefore did not effect a transfer of plaintiffs' property to defendant. Rather, defendant acquired plaintiffs' property by means of a unilateral taking under the 1877 act. As the concept of "consideration" necessitates a contractual relationship between the parties *(see Nez Perce Tribe* v. *United States*, Docket 175, 14 Ind. Cl. Comm. 429, 433 (1971), and authorities citied therein), it follows that no "consideration" has been paid to the plaintiffs for their lands. Whatever compensation has been received by plaintiffs must be considered payments on the claim.

In determining the extent of the compensation received by plaintiffs for their property taken under the 1877 act, defendant is entitled to credit, as payments on the claim, for the value of all property transferred to plaintiffs under the act, and for all expenditures on behalf of the Sioux made by the United States in fulfillment of the new obligations assumed under the act.

Under the Indian Claims Commission Act, the burden of proof with respect to payments on the claim is on the defendant. In the context of this case, this burden requires defendant to establish that all expenditures which it asserts as payments on the claim were actually made in compliance with the terms of the 1877 act. Defendant will receive no credit, as payments on the claim, for expenditures not in compliance with the act. Defendant must also establish the market value of any property which it claims that it transferred to plaintiffs under the act.

In meeting its burden of proof, defendant must relate each expenditure that it claims to a specific obligation assumed under the act. General designations, such as "payment in fulfillment of the Act of February 28, 1877," will be insufficient to entitle defendant to any credit. Nor can defendant receive credit for any expenditure made in furtherance of obligations assumed under other treaties or acts of Congress.

Compensation under the 1877 act, with the exception of property actually transferred to plaintiffs by the act, was not all paid at the time of taking. Rather, under Article 5 of the act, payment of compensation was deferred over time. For the purposes of this case it will be convenient to consider the compensation as having been paid on an annual basis. Defendant is entitled to credit for this compensation as of the time it was paid.

As plaintiffs' property was taken under the Fifth Amendment, plaintiffs were entitled to receive just compensation. Such compensation consists of the fair market value of plaintiffs' property on the date of taking, plus interest on that amount from the date of taking until it is paid. *See United States* v. *Klamath and Modoc Tribes*, 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States*, 299 U.S. 476 (1937); *Seaboard Air Line Ry* v. *United States*, 261 U.S. 299 (1933); *United States* v. *Rogers*, 261 U.S. 199 (1921). The proper rate of interest to be applied in Fifth Amendment taking claims before the Commission is 5%. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, Docket 350-F, 28 Ind. Cl. Comm. 264 (1972), appeal docketed, No. 17-72 (Ct. Cl., December 21, 1972).

Interest on the value of plaintiffs' property (principal), as part of just compensation, began to accrue on February 28, 1877, the date of taking. Interest on the remaining unpaid principal continued to accrue each year until the time, if it has yet occurred, when the principal was fully paid. Thus, in making expenditures in fulfillment of the 1877 act, defendant was obligated to pay both principal and accrued interest.

The proper method for allocating deferred Fifth Amendment payments between principal and interest was established by the court in *Uintah and White River Bands* v. *United States*, 139 Ct. Cl. 1, 152 F. Supp. 953 (1957), and has been followed by the Commission in *Ponca Tribe* v. *United States*, Docket 323, 24 Ind. Cl. Comm. 339, 347-48 (1970), *aff'd in part, remanded in part*, 197 Ct. Cl. 1065

(1972), *Three Affiliated Tribes, supra*, 28 Ind. Cl. Comm. 264, and *Lower Sioux Indian Community* v. *United States*, Docket 363 (Second Claim, Act of 1904), 33 Ind. Cl. Comm. 51 (1974). This method apportions payments between principal and interest according to the following formula:

$$\frac{\text{Unpaid principal + accumulated interest}}{\text{Unpaid principal}} = \frac{\text{Amount of deferred payment}}{\text{Portion of payment allocated to principal}}$$

In this case it will be necessary to apply this formula on a year by year basis to determine how to apportion each year's payment between principal and interest. In this formula as applied to this case, the figure for accumulated interest will include the current year's interest accrual plus the remaining unpaid interest from previous years. If, in applying this formula on a year by year basis, the point is reached where principal has been completely paid, interest will cease to accrue, and all further payments will be charged against previously accrued interest.

We have briefly examined the accounting reports submitted by the defendant in the Court of Claims litigation and those submitted to the Commission, which reports we assume will be relied on by defendant to support its assertions of payments on the claim. We are of the opinion that these reports are not in a form which would allow the Commission to ascertain the compensation paid by the defendant in accordance with the guidelines set out above. To enable us to determine the extent of defendant's payments on the claim, and thus whether plaintiff has been paid just compensation, it will be necessary for defendant to prepare a new statement in support of its assertions. Such statement should include only expenditures made in fulfillment of obligations assumed under the 1877 act. These expenditures should be broken down on a year by year basis. Each expenditure must be shown to be in strict compliance with the terms of the 1877 act.

GOLD MINED PRIOR TO FEBRUARY 28, 1877

Article II of the Treaty of April 29, 1868, *supra*, after describing the boundaries of the Great Sioux Reservation, provided as follows:

> . . . and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, . . .

This treaty provision obligated the United States to use whatever means were necessary to keep unauthorized persons out of the Sioux reservation, and to remove from the reservation any unauthorized persons who may have entered the reservation. Initially, the United States fulfilled this obligation. In late 1874 and early 1875, however, either because of an inadequacy of manpower or the unwillingness of Army commanders to enforce the law, the Army was no longer successful in keeping nonIndians out of the reservation.

In November 1875 the President of the United States, knowing that such action was in violation of the Government's treaty obligation, and that such action would certainly result in thousands of nonIndians entering the Great Sioux Reservation to prospect for and mine minerals, ordered the Army to withdraw from the Black Hills and to cease interfering with miners attempting to enter the reservation. As a direct result of the withdrawal of the Army from the Black Hills and the failure of the United States to remove nonIndians from the Sioux reservation, thousands of nonIndians entered the Sioux reservation, established towns, organized mining districts, filed and developed mining claims, and mined and removed gold from the reservation.

Plaintiffs assert that the gold removed from the reservation prior to the valuation date was taken by the United States under the Fifth Amendment, and that they are thus entitled to interest, as part of just compensation, on the in-ground value of the gold. They argue that when the Government allowed the removal of the gold it was in effect taking the gold and giving it to the nonIndian miners. Plaintiffs rely on *Shoshone Tribe* v. *United States, supra*, 299 U.S. 476, and *United States* v. *Klamath and Modoc Tribes, supra*, 304 U.S. 119, to support their contention. Although not agreeing with plaintiffs' theory, the Commission nonetheless holds that the gold removed from the res-

ervation prior to the valuation date was taken by the United States under the Fifth Amendment. It is our opinion that President Grant's order that the Army withdraw from the Black Hills and stop interfering with miners attempting to enter therein was the act of taking.

As the Court of Claims has recently stated,

> . . . In the general law of eminent domain there is no universal test to determine, where Congress has not expressed an intention to condemn, whether and when a taking has nevertheless occurred as a result of the Federal Government's conduct; a court must always evaluate the individual circumstances of the case to answer those questions.

Klamath and Modoc Tribes v. *United States*, 193 Ct. Cl. 670, 685, 436 F. 2d 1008, 1015, *cert. denied*, 404 U.S. 950 (1971). In evaluating the particular facts of this case, however, we can look to previous judicial determinations for guidelines.

It has been held that a taking can take place even when there is no intent on the part of the Government or its agents to confiscate the claimant's property. *See Eyherabide* v. *United States*, 170 Ct. Cl. 598 (1965); *Sioux Tribe of Indians* v. *United States*, 161 Ct. Cl. 413, 315 F. 2d 378, *cert. denied*, 375 U.S. 825 (1963); *Richard* v. *United States*, 152 Ct. Cl. 225, 282 F. 2d 901 (1960). To constitute a taking, it is only necessary that the claimant's loss of its property be the natural and probable consequence of an intentional governmental act. *United Corp.* v. *United States*, 157 Ct. Cl. 721 (1962); *Richard* v. *United States*, *supra*; *B Amusement Co.* v. *United States*, 148 Ct. Cl. 337, 180 F. Supp. 386 (1960). Moreover, the Government or its agent need not be aware that the action will result in claimant's loss of property; it is only necessary that the loss was in fact the natural consequence of the action. *Richard* v. *United States*, *supra*.

It has also been held that a taking can take place without the Government actually acquiring or using the claimant's property. *Widen Co.* v. *United States*, 174 Ct. Cl. 1020, 1027, 357 F. 2d 988, 993 (1966); *Central Eureka Mining Co.* v. *United States*, 134 Ct. Cl. 1, 38, 138 F. Supp. 281, 302 (1956), *rev'd on other grounds*, 357 U.S. 155 (1958). To constitute a taking it is only necessary that the governmental action result in destruction of or substantial interference with the claimant's property rights. *Widen Co.* v. *United*

States, *supra*; *Eyherabide* v. *United States*, *supra*; *Societe Cotonniere Du Tonkin* v. *United States*, 145 Ct. Cl. 426, 441, 171 F. Supp. 951 (1959), *cert. denied* 361 U.S. 965 (1960); *Central Eureka Mining Co.* v. *United States*, *supra*; *see Henry Co.* v. *United States*, 188 Ct. Cl. 39, 411 F. 2d 1246 (1969).

To constitute a taking it is necessary that the governmental action was authorized or, if unauthorized, that it was ratified by Congress. *United States* v. *Goltra*, 312 U.S. 203, 208 (1941); *Confederated Salish and Kootenai Tribes* v. *United States*, 185 Ct. Cl. 421, 401 F. 2d 785 (1968), *cert. denied*, 393 U.S. 1055 (1969); *Societe Cotonniere Du Tonkin* v. *United States*, *supra*.

The facts of this case indicate that the removal of the gold from plaintiffs' reservation was the direct and natural consequence of President Grant's order. Moreover, although such a showing is not necessary to establish a taking (*see Richard* v. *United States*, *supra*), it is clear that President Grant was aware that removal of the Army would result in extensive mining of gold from the Black Hills. In addition, President Grant's order resulted in a substantial interference with plaintiffs' property interest in the gold in their reservation. Finally, President Grant's order was authorized by Article 2, Section 2 of the Constitution, which declares the President of the United States commander in chief of the Army and thus grants him power to deploy troops as he sees fit. *See Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1849). We conclude that plaintiffs' gold was taken under the Fifth Amendment. We hold that the date of taking was November 17, 1875, the date on which the Army began to withdraw from the Black Hills.

Plaintiffs have not received any compensation for the gold removed from the Black Hills prior to the valuation date. As the gold was taken under the United States' power of eminent domain, plaintiffs are entitled to recover, as just compensation, the in-ground value of the gold removed (its value to plaintiffs) plus interest on that amount from November 17, 1875, until it is paid. See *United States* v. *Klamath and Modoc Tribes*, *supra* (304 U.S. 119); *Shoshone Tribe* v. *United States*, *supra*; *Seaboard Air Line Ry* v. *United States*, 261 U.S. 299 (1933); *United States* v. *Rogers*, 255 U.S. 163 (1921). In *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, Docket 350–F, 28 Ind. Cl. Comm. 264 (1972), *appeal docketed*, App. No. 17-72 (Ct. Cl., December 21, 1972), we decided that the

proper rate of interest in Fifth Amendment taking cases was 5 percent.

Plaintiffs, relying on the opinion of Mr. Full, assert that the in-ground value of the gold removed prior to the valuation date was $1,075,000. Defendant, relying on the opinion of Mr. Oberbillig, asserts that the in-ground value of the gold was $200,000.

We have summarized the oinions of Mr. Full and Mr. Oberbillig in finding of fact 78. Both of these opinions resulted from deducting costs of production from the gross value of the gold. The Commission is of the opinion that there is insufficient evidence to support any finding as to the actual costs involved in mining and processing the gold mined prior to the valuation date. We shall therefore adopt our rulings In *Goshute Tribe*, *supra* (31 Ind. Cl. Comm. at 246-47), and *Western Shoshone*, *supra* (29 Ind. Cl. Comm. at 56), and hold that the value to plaintiffs of the gold removed was 20 percent of the gross value of the gold.

Plaintiffs may therefore recover from defendant $450,000, plus 5 percent simple interest on that amount from November 17, 1875, until it is paid.[14]

RIGHT OF WAY

Article 2 of the Act of Febraury 28, 1877, *supra*, provides as follows:

> . . . The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

Plaintiffs contend that under this article the United States obtained from them rights of way or easements to construct three roads across the Sioux Reservation, and a right of

[14] Plaintiffs argue alternatively that the removal of gold from their reservation constituted a willful and deliberate trespass for which the United States is liable, and that they are therefore entitled to recover the gross value of the gold removed without any deductions for the cost of production. Since we have decided the gold removed was taken under the Fifth Amendment, we need not address ourselves to plaintiffs' alternative argument.

way or easement to navigate the Missouri River through the Sioux Reservation. Plaintiffs claim that they are entitled to compensation for the acquisition of these rights. Defendant on the other hand, argues that the United States in fact never acquired the road rights of way, that the plaintiffs never possessed the right of navigation on the Missouri River and could therefore not grant it to the United States, and that therefore plaintiffs are not entitled to recover anything under Article 2 of the 1877 act. We hold that the road rights of way were compensable interests which the United States obtained from the Sioux and for which the Sioux should have been compensated, but that defendant is not liable to plaintiffs for the alleged acquisition of the right of free navigation of the Missouri River.

In their memorandum concerning the existence and compensibility of easements acquired by the United States under the 1877 act, filed February 9, 1973, plaintiffs stated that they had been unable to find any evidence that the President had in fact "designated" routes for wagon roads through the Sioux reservation. They therefore stated that they would assume, for the purpose of their memorandum, that the three roads were never actually located on the ground. In its response to plaintiffs' memorandum, defendant argued that the rights in Article 2 of the act were subject to a condition precedent—designation of routes by the President—and that since plaintiffs agreed that the routes had in fact never been designated the rights of way had never been acquired by the United States.

In finding of fact 80 we have summarized evidence which indicates that the routes for the wagon roads were in fact designated by the President. We have quoted an official publication of the descriptions of these routes by the War Department. Absent any evidence to the contrary, we must assume that the publication of these route descriptions was authorized by the President. We therefore conclude that under Article 2 of the 1877 act the United States acquired and exercised the right to construct three wagon roads through the Sioux reservation.

The right to build roads across the Sioux reservation was in the nature of a right of way. *See generally* 3 H. Tiffany, *The Law of Real Property* §772 (3d ed. B. Jones 1939). A right of way is an easement, and is thus an interest in property. *See United States* v. *Virginia Electric and Power Co.* 365 U.S. 624, 627 (1961); *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U.S. 613, 618 (1935);

United States v. *Welch*, 217 U.S. 333, 339 (1910). An easement is a compensable property interest. *United States* v. *Sunset Cemetery Co.* 132 F. 2d 163, 164-65 (7th Cir. 1943); *Lynn* v. *United States*, 110 F 2d 586, 589 (5th Cir. 1940). The wagon road rights of way created under Article 2 of the 1877 act were therefore compensable interests.

In their memorandum plaintiffs assert that they acquired title to over 300 miles of the Missouri River under the Treaty of April 29, 1868, *supra*, which fixed the boundary of the Great Sioux Reservation on the east bank of the Missouri. They then argue that the right to free navigation in Article 2 of the 1877 act created an easement in the United States for which they are entitled to compensation.

The Missouri River, as it flowed through the Great Sioux Reservation in 1877 was a navigable water of the United States. *See The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870); finding of fact 10, *infra*. As such it was under the complete control and dominion of the United States.. See *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201 (1967); *United States* v. *Rands*, 389 U.S. 121, 122-23 (1967); *United States* v. *Twin City Power Co.*, 350 U.S. 222, 224-25 (1956); *Gibsen* v. *United States*, 166 U.S. 269 (1897). Any right which the Sioux might have in the banks of the river or its bed is subordinate to the United States' power over navigable waters originating in Article I Section 8 of the Constitution. *United States* v. *Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 62 (1913); *Gibsen* v. *United States*, *supra*.

Plaintiffs argue that their recognized title under the 1868 treaty included the right to control the Missouri River, citing *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970). In *Choctaw*, however, the court held only that the Indians had title to the stream bed. The court recognized that the United States had a navigational easement over the surface of the river. *See* 397 U.S. at 635. In construing grants of land by the United States, we are faced with the strong presumption that the sovereign never intends to cede control over navigable water to private parties. *United States* v. *Oregon*, 295 U.S. 1, 14 (1935); *Massachusetts* v. *New York*, 271 U.S. 65, 89 (1926). There is no language in the 1868 treaty, or any evidence in the record, which rebuts this presumption. We conclude that the United States had the right to free navigation of the Missouri River prior to the 1877, and is therefore not liable to plaintiffs for such right under article 2 of the 1877 act.

This case shall proceed to a determination of the amount of compensation received by plaintiffs under the 1877 act, including the value of any property transferred to plaintiffs under the act; and to determination of the value of the road rights of way acquired by the United States under the 1877 act.

_____

John T. Vance, Commissioner

We concur:

_____

Richard W. Yarborough, Commissioner

_____

Margaret H. Pierce, Commissioner

_____

Brantley Blue, Commissioner

[Maps and diagrams omitted in printing]

Kuykendall, Chairman, dissenting in part:

I disagree with the majority's conclusion that the plaintiff's Fifth Amendment claim is not barred by res judicata by virtue of the opinion and decision of the Court of Claims in *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943).

When the Court of Claims' decision is considered as a whole it becomes clear that the court squarely ruled on and denied the Sioux claim that there was a Fifth Amendment taking and dismissed any "moral claim" on jurisdictional grounds. In support of this view, I set forth below some of the pertinent language of the court together with my comments. The quotations from the court's opinion are single spaced.

The claim which the Sioux Tribe brought before the Court of Claims pursuant to the Jurisdictional Act of June 3, 1920, was based on the contention that the Act of February 28, 1877, constituted a taking of a portion of the

Sioux reservation under the Fifth Amendment without the payment of just compensation to the Sioux.

> Plaintiff seeks to recover $189,368,531.05, together with an additional amount measured by interest as a part of just compensation amounting in all to approximately $739,116,256 for the alleged taking by the defendant in 1877 of certain lands, and rights in lands of the plaintiff, amounting to 73,781,826.19 acres, alleged to have been contrary to and in violation of provisions of treaties of September 17, 1851, 11 Stat. 749, and April 29, 1868, 15 Stat. 635. [p. 616]

* * * * *

> The claim presented in this case by the Sioux Tribe is for just compensation for the alleged taking for public purposes or the misappropriation by the defendant by the act of Congress of February 28, 1877, 19 Stat. 254, of land and rights in land, amounting to 73,781,826.19 acres, without the payment of compensation therefor and contrary to and in violation of articles 2, 12, 15, and 17 of the treaty concluded April 29, 1868, ratified February 16, 1869, and proclaimed February 24, 1869, 15 Stat. 635 (finding 3), and certain provisions of the treaty of September 17, 1851. [p. 657]

The Court of Claims had jurisdiction of the claim, and the Sioux Tribe would have been entitled to recover if their contention was valid.

> If the lands or other property rights of plaintiff were misappropriated or taken by the United States in violation of the treaty of 1868, and contrary to the authority which Congress possessed under the treaty and the law governing the rights of the parties, without the payment of compensation therefor and under such circumstances as to give rise to an implied contract to pay just compensation for the property taken contemporaneously with the misappropriation or taking, plaintiff is entitled to recover. [pp. 657, 658]

The Court of Claims considered the merits of the Sioux Fifth Amendment taking claim and determined that the Sioux were not entitled to recover.

> A study of the facts and circumstances of this case, the provisions of article 12 of the treaty of 1868, the acts of Congress of August 15, 1876, and February 28, 1877, and the application thereof to the provisions of the jurisdictional act in the light of the established principles governing the rights and privileges of the Indians and the power and authority of the Government in their dealings with each other leads us to the conclusion that as a matter of law the plaintiff tribe is not entitled to recover from the United States as for a "taking" or "for the misappropriation of any lands of said tribe." [p. 666]

The Court of Claims determined that the Sioux claim was moral rather than legal.

> In essence, therefore, the present claim is moral, rather than legal, and before we can adjudicate and render judgement upon it, we must have from Congress clear authority to do so, which authority, we think, under the rule announced in the *Price* and *Osage* cases, and other cases cited, *supra*, was not conferred by the jurisdictional act. [p. 670]

The court held it did not have jurisdiction to consider moral claims.

> . . . To hold otherwise, it would be necessary for us to go back of the acts of August 15, 1876, and February 28, 1877, and inquire into the policy as well as the judgement and wisdom of Congress which prompted it to act as it did and, therefore, adjudicate and render judgment either for or against the Indians on a moral claim. We cannot find that authority in the jurisdictional act. [p. 682]

* * * * *

The jurisdictional act confers no equitable jurisdiction such as would be applicable to the claim here presented. Compare *Choctaw Nation* v. *United States*, 119 U.S. 1, 2, 28, 29; *Winton* v. *Amos*, 255 U.S. 373, and *Seminole Nation* v. *United States*, 316 U.S. 286 (No. 348), decided May 11, 1942. While in a proper case the court may adjudicate a claim on equitable principles relating to fraudulent acts of those charged with the duty of administering the property and affairs of the Indians under treaties and acts of Congress—*Seminole Nation* v. *United States, supra; Ross* v. *Stewart, 277* U.S. 530; *United States v. Wildcat*, 244 U.S. 111; *Campbell* v. *Wadsworth*, 248 U.S. 169—no fraud is alleged in this case and there is no basis for such an

> allegation with respect to the action of Congress in August 1876 and February 1877. In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender. [p. 685]

I cannot agree with the majority's view that the Court of Claims decided the Sioux's Fifth Amendment claim on the ground that since Congress had the legal authority to acquire its property under the 1877 act, the jurisdictional act allowed for no recovery by plaintiffs. The court considered the case of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), to be almost identical to the *Sioux* case, not only on its facts but also with respect to the treaty and statutory provisions. The court carefully reviewed the principles announced by the Supreme Court in *Lone Wolf*, and subsequent cases, in ascertaining the proper criteria for determining any liability of the United States under the Sioux's legal claim. The court noted that Congress possessed plenary power over Indian tribes and, when necessary, the authority to legislate in whatever way it might choose with reference to the management and control of the property and affairs of the Indians, even though such action should be in conflict with some treaty provision and against the desire of the Indians. But the court also found it well established that:

> . . . the United States cannot, through Congress or otherwise, arbitrarily deprive the Indians of their lands or monies secured to them by a treaty or law of Congress, or to appropriate the lands of Indian tribes to its own purposes or give them to others without rendering or assuming an obligation to render just compensation therefor. [pp. 673, 674.]

The court entered detailed findings with respect to the United States' efforts to secure a relinquishment by the Sioux of a part of their reservation and to compensate the Indians therefor. The court concluded

> . . . In the case at bar, the Congress, in an act enacted because of the situation encountered and pursuant to a policy which in its wisdom it deemed to be in the interest and for the benefit and welfare of the Indians of the Sioux Tribe, as well as for the necessities of the Government, required the Indians to sell or surrender to the Government a portion of their land and hunting rights on other land in return for that which the Congress, in its judgment, deemed to be adequate consideration for what the Indians were required to give up, which consideration the Government was not otherwise under any legal obligation to pay. [p. 667.]

* * * * *

> In other words, if in the case at bar, Congress had the authority legally to do what it did, and if the action taken and the results of that action were pursuant to and based upon what Congress deemed in the circumstances to be for the interest of the Indians, as the facts clearly show was the case, the Indians have no *legal right* to complain, or to maintain under the terms of the jurisdictional act a claim for more money, plus the addition of interest from 1877, in addition to the amount which Congress stipulated should be paid and which has been and is being paid, and will continue to be paid until the Indians, with the assistance of the Government, became self-supporting. Congress possessed the authority to take the action of which the plaintiff complains, and since the record shows that the action taken was pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties there was no misappropriation of the land by the Government and the court may not go back of the acts of 1876 and 1877 and inquire into the motive which prompted the enactment of this legislation or the wisdom thereof. [p. 668.]

Thus the Court of Claims adjudicated the Fifth Amendment claim on its merits in accordance with the applicable case law relating to legal claims for the taking of Indian lands.

The Court of Claims was well aware of the fact that Indian tribes could prevail in such claims and secure awards of "just compensation." The court discussed two such cases which were relied upon by the Sioux in support of their claim. Both cases, *United States* v. *Creek Nation*, 295 U.S. 103 (1935), and *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937), had recently been decided by the Supreme Court on writs of certiorari to the Court of Claims. In both cases the Supreme Court reversed the Court of Claims—holding that the Creek and the Shoshone were entitled to awards of just compensation for takings by

the United States within the meaning of the Fifth Amendment. The jurisdictional acts in both the *Creek* and *Shoshone* cases were virtually the same as the Sioux jurisdictional act. As the Court of Claims observed, the *Creek* and *Shoshone* cases "were clearly and unquestionably *legal* claims" [p. 673]. The Indian plaintiffs recovered in those cases because, as the court stated in Sioux, "Congress exercised an arbitrary power . . . which deprived the Indians of their property without rendering, or assuming an obligation to render compensation therefor." [p. 673.] Thus, the Court of Claims distinguished *Creek* and *Shoshone* from the Sioux situation wherein Congress had acted in a manner which Congress deemed—and as the court found the facts clearly showed—was for the interest of the Indians and for what Congress deemed to be adequate consideration.

The Sioux failed to recover on their legal claim in *Sioux Tribe* v. *United States*, *supra*, (97 Ct. Cl. 613) because the facts did not as a matter of law permit a finding that the United States had taken the Sioux lands under the Fifth Amendment. It was not, as the majority would have it, because of any jurisdictional bar to a recovery on the legal claim.

The Court of Claims in 1956 considered that the legal claim of the Sioux had been decided by 97 Ct. Cl. 613 and that the only suit which the Sioux could bring before the Indian Claims Commission was one based on Clauses (3) and (5) of Section 2 of the Indian Claims Commission Act.

> . . . Category (2), we think, involves a claim already decided by this court, *Sioux Tribe of Indians* v. *United Sates*, 97 C. Cls. 613, *cert. denied*, 318 U.S. 789 (1943), when this identical case was tried and decided before this court under a special jurisdictional act, 41 Stat. 738, authorizing the Court of Claims "to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon." The Court there held that the claimants had no legal right to any compensation other than that which was provided for by the Act of February 28, 1877, and stated that the only claim the Sioux Indians had, if they had one at all, was moral and until the court was given jurisdiction by the Congress to hear a moral claim it could not act. The Commission has been given the jurisdiction to hear moral claims under categories numbered (3) and (5). The appellant in this case can bring suit only under those categories. It has done so and relief has been denied. [*Sioux Tribe* v. *United States*, 146 F. Supp. 229, 239-240 (1956), *aff'g* Docket 74, 2 Ind. Cl. Comm. 646 (1954).]

This decision was later vacated and the case remanded to the Commission for a determination of whether the plaintiff was entitled to have the proof in the case reopened. Therefore, the opinion has no force as a precedent. Nevertheless, my confidence in the correctness of my position is reinforced by the fact that in 1956 five judges of the Court of Claims unanimously reached the same conclusion I have reached. I note also that four of these judges participated in the unanimous 1942 decision with which we are now concerned.

Jerome K. Kuykendall, Chairman

BEFORE THE INDIAN CLAIMS COMMISSION

Docket No. 74-B

THE SIOUX NATION OF INDIANS, CONSISTING IN PART OF THE SIOUX TRIBE OF THE ROSEBUD INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE STANDING ROCK INDIAN RESERVATION, NORTH AND SOUTH DAKOTA; THE SIOUX TRIBE OF THE PINE INDIAN RESERVATION, SOUTH DAKOTA;
THE SIOUX TRIBE OF THE CROW CREEK INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE LOWER BRULE INDIAN RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE CHEYENNE RIVER RESERVATION, SOUTH DAKOTA; THE SIOUX TRIBE OF THE SANTEE INDIAN RESERVATION, NEBRASKA; AND THE SIOUX TRIBE OF THE FORT PECK INDIAN RESERVATION, MONTANA,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Decided: February 15, 1974

FINDINGS OF FACT

The Commission makes the following findings of fact:

1. *PARTIES.*

The plaintiffs in Docket 74-B—the Sioux Tribe of the Rosebud Reservation, South Dakota; the Sioux Tribe of the Standing Rock Indian Reservation, North and South Dakota; the Sioux Tribe of the Pine Ridge Indian Reservation, South Dakota; the Sioux Tribe of the Crow Creek Indian Reservation, South Dakota; the Sioux Tribe of the Lower Brule Indian Reservation, South Dakota; the Sioux Tribe of the Cheyenne River Reservation, South Dakota; The Sioux Tribe of the Santee Indian Reservation, Nebraska; and the Sioux Tribe of the Fort Peck Indian Reservation, Montana are each identifiable groups of American Indians maintaining a tribal organization recognized by the Secretary of the Interior as having authority to maintain this suit under Section 2 of the Indian Claims Commission 25 U.S.C. § 70a (1970). The plaintiffs are the successors in

interest the Sioux tribes or bands which signed the Treaty of April 29, 1868, 15 Stat. 635.

2. *AREA INVOLVED AND DATE OF TAKING.*

The area to be valued is located generally in the western part of the present State of South Dakota. It was carved out of the Great Sioux Reservation[1] by the Act of February 28, 1877, 19 Stat. 254. The subject territory contains 7,345,157 acres, and may be defined as follows:

> Beginning at the intersection of the 103rd meridian of west longitude with the northern boundary of the State of Nebraska, then north along the 103rd meridian to the south fork of the Cheyenne River, then down the south fork to its junction with the north fork (Belle Fourche River), then up the north fork of the Cheyenne to the 103rd meridian, then north along the 103rd meridian to the 46th parallel of north latitude, then west along the 46th parallel to the 104th meridian, then south along the 104th meridian to the northern boundary of the State of Nebraska, then east along the northern boundary of Nebraska to the point of beginning.

Royce assigned the cession number 598 to the subject tract.

The date of valuation of the subject area is February 28, 1877.

3. *EARLY CONTACT OF AMERICANS WITH THE SUBJECT AREA.*

Americans had been aware of the potential value of the subject area long before it was acquired from the Sioux by the United States. There is evidence that mining and trap-

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[1] The Great Sioux Reservation was set aside by the Treaty of April 1868, 15 Stat. 635, and was described as follows:

> . . . commencing on the east bank of the Missouri river where the forty-sixty parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebrasks to the one hundred and fourth degree of longitude west from Greenwich, then north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river . . . [Id. at 636.]

ping parties entered the Black Hills area as early as the 1830's and 1840's. During the early 1850's, prospecting parties enroute to California mined in the Black Hills and recovered gold.

In 1857 Lt. G. K. Warren, a topographical engineer, led a reconnaissance expedition into Sioux country. In the Black Hills area, Lt. Warren discovered gold. In his report he also noted that the area was watered by beautiful flowing streams, and that it contained rich valleys capable of cultivation and ample timber and other building materials.

Another military party, under the command of Brigadier General W.F. Raynolds, surveyed the portion of the subject tract between the 43rd and 45th parallels in 1859 and 1860. In describing the Black Hills, General Raynolds stated:

> . . . The whole region of the Black Hills is unquestionably destined, at no distant date, to afford homes for a thriving population. The mountains will furnish a sufficient supply of pine lumber for ordinary uses; and although timber is very scarce in the region as a whole (from Fort Pierre to the Powder River), yet the Black Hills will fully supply this great deficiency in the districts immediately joining. [Pl. Ex. CB-13: "The Black Hills-Their Value, Regardless of Gold," *Potters American Monthly*, August 1875, Vol. V, No. 44, p. 618.]

General Raynolds also noted that the valleys in the hills contained rich and fertile soils and were covered with a heavy growth of grass.

During 1865 a military expedition enroute to the Powder River area passed through the northern Black Hills. Many specimens of gold-bearing quartz were discovered. In 1866, Dr. Ferdinand V. Hayden led a scientific expedition into the hills. Dr. Hayden found gold and reported that it could be found in almost every stream.

Beginning in 1867, and continuing through 1872, various individuals and organizations formed parties with the intention of entering into the Black Hills for mining activities. These plans generally were thwarted by the United States Army which at that time was intent on keeping Americans out of the Sioux reservation. In 1873 the territorial legislature of Dakota Territory petitioned Congress to move the Sioux to the Eastern portion of the reservation and to open the Black Hills to white settlement.

4. *CONTACT OF AMERICANS WITH THE SUBJECT AREA DURING 1874 AND 1875.*

In early 1874 the Secretary of Interior established a commission, known as the Special Sioux Commission, to negotiate with the Brule and Ogallala Sioux to abandon their rights under articles XI and XVI of the 1868 treaty, and to confine their activities to the reservation.[2] The Commission was only partly successful in its mission, obtaining from the Brules the surrender of their article XI rights only, and obtaining no agreement at all from the Ogallalas.

In May of 1874 the Secretary of War directed Lt. Colonel George A. Custer to command an expedition into the Black Hills to explore the area. Custer, with approximately one thousand men, left Fort Abraham Lincoln, in northern Dakota, on July 2, 1974, circled the northern limits of the Black Hills, and entered them from the west. On this expedition gold was discovered in paying quantities, although the exact extent of the gold field was not known. Reports of the gold find were widely circulated and greatly exaggerated by the press. As a result of these reports, white miners began to invade the Black Hills in great numbers.

During August of 1874 members of the Special Sioux Commission, under the leadership of Samuel D. Hinman, explored the southern Black Hills in search of a new agency site. In his report, dated November 10, 1874, Hinman reported that the Black Hills were bleak and barren, that there was little or no mineral wealth, that the water was of poor quality, and that the hills were generally worthless as agricultural land. It is unclear from the record why Hinman's report was so pessimistic, although his confessed sympathy for the Sioux and their right to retain the Black Hills may have prejudiced his objectivity.

The enthusiasm created by the Custer expedition was not dampened by the Hinman report, and great pressures con-

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[2] In article XI of the 1868 treaty, the Sioux had reserved the right to hunt outside their reservation, north of the North Platte River and along the Republican River so long as the size of the buffalo herd made hunting worthwhile. In article XVI, the United States agreed "that the country north of the North Platte river and east of the summits of the Big Horn mountains" should remain "unceded Indian territory" and closed to white entry. The Commission has determined that under article 16 the Sioux had a right to hunt in the "unceded Indian territory." *Sioux Tribe* v. *United States*, Docket 74, 23 Ind. Cl. Comm. 358 (1970).

tinued to be exerted against the Government to open the Black Hills to white settlement. Great numbers of miners continued to flock to the hills. In 1875 it became apparent to government officials that occupancy of the Black Hills by nonIndians was inevitable, and it was decided to acquire the Black Hills from the Sioux. In order to determine what would be a fair price to the Sioux for the Black Hills, President Grant ordered that a topographical and geological survey be conducted. He appointed Walter P. Jenney, a mining engineer, to head the survey. Jenney was instructed to report on the mineral, timber, and agricultural resources of the Black Hills.

Jenney's preliminary report to the Commissioner of Indian Affairs was dated November 8, 1875. Jenney stated that on entering the hills he had found miners on French Creek, and that after a month's work gold was found in paying quantities of Spring and Rapid Creeks. He further reported that:

> That portion of the Black Hills which may be designated as Harney's Peak goldfield is almost wholly in Dakota, and extends about fifty miles north and south, with an average breadth of nearly twenty miles, covering an area of not less than eight hundred square miles. The valuable gold-deposits, however, are found in the valleys of the streams which drain that area, the gold being derived from the disintegration of the quartz-ledges, which are very numerous in the rocks of that region.
>
> The most extensive and valuable deposits of auriferous gravel discovered during the past season were in the valleys of Spring and Rapid Creeks and their tributaries, where, in almost every case, the gravel-bars are very advantageously situated for working, and where many natural circumstances contribute materially to the profitable extracting of the gold which they contain. [1875 Report of the Commissioner of Indian Affairs, p. 181.]

Jenney also reported that there was sufficient timber and rapidly flowing water for successful mining operations.[3]

[3]Jenney was referring to placer mining. The survey expedition did not carry equipment for testing quartz deposits. Moreover, the expedition did not enter the northern part of the Black Hills where the more extensive quartz lodes were later discovered.

In commenting on the nonmineral attributes of the Black Hills, Jenney noted that, although the area of cultivable land was limited, the soil was deep and fertile and would be sufficient to supply the future population of the area. Jenney estimated that at least one-twentieth of the 3000 square miles of the Black Hills was susceptible of cultivation, and that there were many other large areas which would afford fine grazing.[4]

Throughout the spring and summer of 1875, great numbers of miners moved into the Black Hills. Although the Army succeeded in removing some of these, it was either unable or unwilling to keep the bulk of them out of the Great Sioux Reservation.

5. *ACQUISITION OF THE BLACK HILLS.*

In May 1875 a delegation of Sioux chiefs and other leaders was brought to Washington to hear proposals concerning the purchase of the Black Hills by the United States and the extinguishment of various off-reservation hunting rights possessed by the Sioux. On June 3, 1875, President Grant met with the delegation. He explained to them that if gold were found in large quantities in the Black Hills it would be difficult to keep white people from going there, and that the Government might not make strong efforts to keep them out.

After the members of the Sioux delegation returned to their agencies, an agreement was reached whereby the Sioux relinquished their remaining hunting rights in Nebraska in return for $25,000 in goods. This agreement was apparently never ratified or enacted into law by Congress.

[4]In his annual report to the Secretary of the Interior, the Commissioner of Indian Affairs discussed the Jenney report. He stated,

> . . . The report confirms, in a large degree, the statements of travelers and explorers and the reports of General Custer's military expedition of last year, and shows a gold-field with an area of eight hundred square miles, and around this gold region, principally to the north, an additional area within the Black Hills country of three thousand square miles of arable lands, and this latter embracing along its streams an area equal to two hundred square miles finely adapted to agriculture, while the hill-sides and elevations contiguous thereto are equally adapted to purposes of grazing, making the whole area of three thousand square miles of timber, grazing, and arable land of great value for agricultural purposes. [1875 Report of the Commissioner of Indian Affairs, p.8.]

In mid June 1875, the Secretary of Interior, acting under instructions from President Grant, appointed a commission to negotiate with the Sioux for the cession of the Black Hills and for the surrender of the Sioux right to hunt in the Big Horn area in Southeastern Montana. This Commission became know as the Allison Commission.

During September 1875 the Allsion Commission met with the Sioux in a grand council. It was urged that the Sioux sell the Black Hills because 1—they were unable to support themseleves and ought to bow to the wishes of the Government which fed them, 2—the Army was unable to keep settlers out of the hills and armed conflict between whites and Indians was inevitable, and 3—gold was useless to the Sioux. The Sioux, realizing the great value of the Black Hills to the United States, offered to sell them to the United States for 70 million dollars, plus additional compensation for the gold already mined. The Commission, in return, offered to pay $400,000 per year for the right to mine, grow livestock, and cultivate the soil in the Black Hills, or, in the alternative, to buy the hills outright for six million dollars. The Commission further proposed that the United States purchase the Big Horn area for a total of $500,000, paid over a ten year period. The parties were unable to reach agreement as to the terms of the sale. The Allison Commission reported its failure to the Secretary of Interior.

In November 1875, the Grant Administration began to change its policy toward the Black Hills. The President, with the concurrence of his Secretary of War and Secretary of Interior, decided that, although nonIndians were still forbidden from entering the hills, the army would no longer seek to enforce the law. The Army would be removed from the Black Hills, and no further military opposition was to be offered to miners attempting to enter the hills. No official announcement was made of this policy change.[5]

The Army began its withdrawal from the Black Hills on November 17, 1875. Thereafter, miners flocked to the hills in ever increasing numbers. By January 1876 more than 4,000 whites were reported to be in the Black Hills.

Also in November 1875, the Grant Administration began to pressure Congress for unilateral action to acquire the hills. In his 1875 annual report, Commissioner of Indian

[5]Grant later justified his decision by stating that any further attempt to remove the miners would have resulted in the widespread desertion of the troops.

Affairs Edward Smith noted that the Sioux were unable to support themselves and were receiving about one and one-quarter million dollars in rations annually, which the United States was under no legal obligation to provide. He stated that failure to receive these rations would reduce the Sioux to a state of starvation. It was Smith's opinion that the Government was entitled to ask something of the Sioux in return. He recommended that legislation be sought setting a fair equivalent for the Black Hills, and that a portion of that equivalent should be made to take the place of free rations.

The 1875 Annual Report of the Secretary of Interior voiced a similar attitude. The report stated that for the past two years Congress had been appropriating one million two hundred sixty thousand dollars for sustenance of the Sioux; that this amount was a gratuity for which the Government received nothing; and that without receipt of this amount the Sioux would starve. The Secretary concluded that the Government would be justified in making receipt of further rations contingent on Sioux relinquishment of the Black Hills gold fields.

Without waiting for congressional action, the executive branch precipitated the Sioux situation into a crisis. In response to hostilities against whites and Indians of other tribes in the unceded Indian territory by small numbers of nonreservation Sioux, the Secretary of Interior, on December 3, 1875, instructed the Commissioner of Indian Affairs to direct agents at all agencies in Dakota and at Fort Peck to notify the Sioux in the Yellowstone and Powder River areas "that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile, and treated accordingly by the military force." P1. Ex. 548: S. Ex. Doc. No. 52, 44th Cong. 1st Sess. 5 (1876).

The bulk of the Sioux who were in the unceded territory during the winter of 1875–76 were hunting with the permission of their agents, as they had the right to do under Article XVI of the 1868 treaty. When they received notice of the order to return to the reservation, they replied that they would return in the spring after the hunt. The severity of the winter made it impossible for most of the Sioux to comply with the Secretary's order. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been complied

with, and that the Sioux were being turned over to the Army for appropriate military action.

The Army commenced hostilities against the Sioux in the spring of 1876. The war was to last for more than a year and was bitterly fought by both sides.

On June 25, 1876, the Seventh Cavalry, under the command of George A. Custer, attempted a surprise attack upon an Indian encampment in the valley of the Little Big Horn River, in what is now Montana. The Sioux inflicted a crushing defeat on the Army, killing 259 men, including Custer.

News of the battle reached Washington on July 5, and fomented great anti-Sioux sentiment. Congress reacted by attaching the following rider to a one million dollar Sioux subsistence provision in the appropriations act enacted August 15, 1876, 19 Stat. 176, 192:

> . . . *Provided*, That none of said sums appropriated for said Sioux Indians shall paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provide for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision:

In short this provision meant that unless the Sioux ceded the Black Hills to the United States, and surrendered cheir right to hunt off the reservation, the United States would allow them all to starve.

In accordance with the congressional directive the President appointed another commission to negotiate with the Sioux. During the autumn of 1876 the commission met with the Sioux at the various agencies. Despite the ultimatum contained in the appropriations act, less than 10% of the male adult Sioux assented to the cession agreement proposed to them by the commission. Nonetheless, the commission submitted the purported agreement to the President, who in turn submitted it to Congress.

Article XII of the 1868 treaty, which created the Great Sioux Reservation, provided that

> . . . No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; . . . [15 Stat. 635, 639.]

The 1876 agreement clearly did not comply with this provision. Nevertheless Congress effectuated the terms of the agreement by the Act of February 28, 1877, 19 Stat. 254.

The 1877 Act provided for the removal of the subject tract from the Sioux reservation and the abrogation of all Sioux rights outside of the reservation, and also contained the following provision in Article 2.

> . . . The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

[Remainder of findings relate to value and are omitted]

BEFORE THE INDIAN CLAIMS COMMISSION
Docket No. 74-B

THE SIOUX NATION OF INDIANS, ET AL.,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

Dated: May 19, 1976

REPORT OF THE COMMISSIONER

This case having been assigned to the undersigned Commissioner, and the parties having appeared before him on May 5, 1976, and submitted their proof on the issues of the value of the rights of way obtained by the United States from the Sioux by the Act of February 28, 1877 and the extent of defendant's payments on plaintiffs' claim, the Commissioner reports his preliminary decision on the following issues as provided by Rule 26 of the Commission's Rules of Procedure:

1. What is the value of the three rights of way through the Sioux Reservation obtained by the United States under the Act of February 28, 1877?

$3,484.00.

2. What payments have been made by defendant on plaintiffs' claims arising out of the Act of February 28, 1877?

None.

Dated at Washington, D.C., this *19th* day of May, 1976.

John T. Vance, Commissioner

TREATY OF APRIL 29, 1868
15 STAT. 635

Treaty between the United States of America and different Tribes of Sioux Indians; Concluded April 29 et seq., 1868; Ratification advised February 16, 1869; Proclaimed February 24, 1869.

ANDREW JOHNSON,

PRESIDENT OF THE UNITED STATES OF AMERICA,

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a treaty was made and concluded at Fort Laramie, in the Territory of Dakota, [now in the Territory of Wyoming,] on the twenty-ninth day of April, and afterwards, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Nathaniel G. Taylor, William T. Sherman, William S. Harney, John B. Sanborn, S.F. Tappan, C.C. Augur, and Alfred H. Terry, commissioners, on the part of the United States, and Ma-za-pon-kaska, Tah-shun-ka-co-qui-pah, Heh-won-ge-chat, Mah-to-non-pah, Little Chief, Makh-pi-ah-lu-tah, Co-cam-i-ya-ya, Con-te-pe-ta, Ma-wa-tau-ni-hav-ska, He-na-pin-wa-ni-ca, Wah-pah-shaw, and other chiefs and headmen of different tribes of Sioux Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:

Articles of a treaty made and concluded by and between Lieutenant-General William T. Sherman, General William S. Harney, General Alfred H. Terry, General C.C. Augur, J.B. Henderson, Nathaniel G. Taylor, John B. Sanborn, and Samuel F. Tappan, duly appointed commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

ARTICLE I. From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is

hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to maintain it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also reimburse the injured person for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith, the Indians herein named solemnly agree that they will, upon proof made to their agent and notice by him, deliver up the wrong-doer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this or other treaties made with the United States. And the President, on advising with the Commissioner of Indian Affairs, shall prescribe such rules and regulations for ascertaining damages under the provisions of this article as in his judgment may be proper. But no one sustaining loss while violating the provisions of this treaty or the laws of the United States shall be reimbursed therefor.

ARTICLE II. The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri river where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river, and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States,

to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employés of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE III. If it should appear from actual survey or other satisfactory examination of said tract of land that it contains less than one hundred and sixty acres of tillable land for each person who, at the time, may be authorized to reside on it under the provisions of this treaty, and a very considerable number of such persons shall be disposed to commence cultivating the soil as farmers, the United States agrees to set apart, for the use of said Indians, as herein provided, such additional quantity of arable land, adjoining to said reservation, or as near to the same as it can be obtained, as may be required to provide the necessary amount.

ARTICLE IV. The United States agrees, at its own proper expense, to construct at some place on the Missouri river, near the centre of said reservation, where timber and water may be convenient, the following buildings, to wit: a warehouse, a storeroom for the use of the agent in storing goods belonging to the Indians, to cost not less than twenty-five hundred dollars; an agency building for the residence of the agent, to cost not exceeding three thousand dollars; a residence for the physician, to cost not more than three thousand dollars; and five other buildings, for a carpenter, farmer, blacksmith, miller, and engineer, each to cost not exceeding two thousand dollars; also a school-house or mission building, so soon as a sufficient number of children can be induced by the agent to attend school, which shall not cost exceeding five thousand dollars.

The United States agrees further to cause to be erected on said reservation, near the other buildings herein authorized, a good steam circular saw-mill, with a grist-mill and shingle machine attached to the same, to cost not exceeding eight thousand dollars.

ARTICLE V. The United States agrees that the agent for said Indians shall in the future make his home at the agency building; that he shall reside among them, and keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by and against the Indians as may be presented for investigation under the provisions of their treaty stipulations, as also for the faithful discharge of other duties enjoined on him by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his findings, to the Commissioner of Indian Affairs, whose decision, subject to the revision of the Secretary of the Interior, shall be binding on the parties to this treaty.

ARTICLE VI. If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding three hundred and twenty acres in extent, which tract when so selected, certified, and recorded in the "land book," as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate, containing a description thereof and the name of the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it, by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Sioux Land Book."

The President may, at any time, order a survey of the reservation, and, when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper. And it is further stipulated that any male Indians over eighteen years of age, of any band or tribe that is or shall hereafter become a party to this treaty, who now is or who shall hereafter become a resident or occupant of any reservation or territory not included in the tract of country designated and described in this treaty for the permanent home of the Indians, which is not mineral land, nor reserved by the United States for special purposes other than Indian occupation, and who shall have made improvements thereon of the value of two hundred dollars or more, and continuously occupied the same as a homestead for the term of three years, shall be entitled to receive from the United States a patent for one hundred and sixty acres of land including his said improvements, the same to be in the form of the legal subdivisions of the surveys of the public lands. Upon application in writing, sustained by the proof of two disinterested witnesses, made to the register of the local land office when the land sought to be entered is within a land district, and when the tract sought to be entered is not in any land district, then upon said application and proof being made to the commissioner of the general land office and the right of such Indian or Indians to enter such tract or tracts of land shall accrue and be perfect from the date of his first improvements thereon, and shall continue as long as he continues his residence and improvements, and no longer. And any Indian or Indians receiving a patent for land under the foregoing provisions, shall thereby and from thenceforth become and be a citizen of the United States, and be entitled to all the privileges and immunities of such citizens, and shall, at the same time, retain all his rights to benefits accruing to Indians under this treaty.

ARTICLE VII. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as are or may be settled on said agricultural reservations, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. The

provisions of this article to continue for not less than twenty years.

ARTICLE VIII. When the head of a family or lodge shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of three years more, he shall be entitled to receive seeds and implements as aforesaid, not exceeding in value twenty-five dollars.

And it is further stipulated that such persons as commence farming shall receive instruction from the farmer herein provided for, and whenever more than one hundred persons shall enter upon the cultivation of the soil, a second blacksmith shall be provided, with such iron, steel, and other material as may be needed.

ARTICLE IX. At any time after ten years from the making of this treaty, the United States shall have the privilege of withdrawing the physician, farmer, blacksmith, carpenter, engineer, and miller herein provided for, but in case of such withdrawal, an additional sum thereafter of ten thousand dollars per annum shall be devoted to the education of said Indians, and the Commissioner of Indian Affairs shall, upon careful inquiry into their condition, make such rules and regulations for the expenditure of said sum as will best promote the educational and moral improvement of said tribes.

ARTICLE X. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named, under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house or the reservation herein named, on [or before*] the first day of August of each year, for thirty years, the following articles, to wit:

For each male person over fourteen years of age, a suit of good substantial woollen clothing, consisting of coat, pantaloons, flannel shirt, hat, and a pair of home-made socks.

For each female over twelve years of age, a flannel skirt, or the goods necessary to make it, a pair of woollen hose, twelve yards of calico, and twelve yards of cotton domestics.

*The words "or before" are inserted with black pencil.

For the boys and girls under the ages named, such flannel and cotton goods as may be needed to make each a suit as aforesaid, together with a pair of woollen hose for each.

And in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the clothing herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of thirty years, while such persons roam and hunt, and twenty dollars for each person who engages in farming, to be used by the Secretary of the Interior in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper. And if within the thirty years, at any time, it shall appear that the amount of money needed for clothing under this article can be appropriated to better uses for the Indians named herein, Congress may, by law, change the appropriation to other purposes; but in no event shall the amount of this appropriation be withdrawn or discontinued for a period named. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery. And it is hereby expressly stipulated that each Indian over the age of four years, who shall have removed to and settled permanently upon said reservation and complied with the stipulations of this treaty, shall be entitled to receive from the United States, for the period of four years after he shall have settled upon said reservation, one pound of meat and one pound of flour per day, provided the Indians cannot furnish their own subsistence at an earlier date. And it is further stipulated that the United States will furnish and deliver to each lodge of Indians or family of persons legally incorporated with them, who shall remove to the reservation herein described and commence farming, one good American cow, and one good well-broken pair of American oxen within sixty days after such lodge or family shall have so settled upon said reservation.

ARTICLE XI. In consideration of the advantages and benefits conferred by this treaty and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish

all right to occupy permanently the territory outside their reservation as herein defined, but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill river, so long as the buffalo may range thereon in such numbers as to justify the chase. And they, the said Indians, further expressly agree:

1st. That they will withdraw all opposition to the construction of the railroads now being built on the plains.

2d. That they will permit the peaceful construction of any railroad not passing over their reservation as herein defined.

3d. That they will not attack any persons at home, or travelling, nor molest or disturb any wagon trains, coaches, mules, or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. They will never capture, or carry off from the settlements, white women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They withdraw all pretence of opposition to the construction of the railroad now being built along the Platte river and westward to the Pacific ocean, and they will not in future object to the construction of railroads, wagon roads, mail stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States. But should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or headman of the tribe.

7th. They agree to withdraw all opposition to the military posts or roads now established south of the North Platte river, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE XII. No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in Article VI. of this treaty.

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ARTICLE XIII. The United States hereby agrees to furnish annually to the Indians the physician, teachers, carpenter, miller, engineer, farmer, and blacksmiths, as herein contemplated, and that such appropriations shall be made from time to time, on the estimates of the Secretary of the Interior, as will be sufficient to employ such persons.

ARTICLE XIV. It is agreed that the sum of five hundred dollars annually, for three years from date, shall be expended in presents to the ten persons of said tribe who in the judgment of the agent may grow the most valuable crops for the respective year.

ARTICLE XV. The Indians herein named agree that when the agency house and other buildings shall be constructed on the reservation named, they will regard said reservation their permanent home, and they will make no permanent settlement elsewhere; but they shall have the right, subject to the conditions and modifications of this treaty, to hunt, as stipulated in Article XI. hereof.

ARTICLE XVI. The United States hereby agrees and stipulates that the country north of the North Platte river and east of the summits of the Big Horn mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians, first had and obtained, to pass through the same; and it is further agreed by the United States, that within ninety days after the conclusion of peace with all the bands of the Sioux nation, the military posts now established in the territory in this article named shall be abandoned, and that the road leading to them and by them to the settlements in the Territory of Montana shall be closed.

ARTICLE XVII. It is hereby expressly understood and agreed by and between the respective parties to this treaty that the execution of this treaty and its ratification by the United States Senate shall have the effect, and shall be construed as abrogating and annulling all treaties and agreements heretofore entered into between the respective parties hereto, so far as such treaties and agreements obligate the United States to furnish and provide money, clothing, or other articles of property to such Indians and bands of Indians as become parties to this treaty, but no further.

In testimony of which, we the said commissioners, and we, the chiefs and headmen of the Brulé band of the Sioux nation, have hereunto set our hands and seals at Fort Laramie, Dakota Territory, this twenty-ninth day of April, in the year one thousand eight hundred and sixty-eight.

N. G. TAYLOR, [SEAL.]
W. T. SHERMAN, [SEAL.]
Lt. Genl.
WM. S. HARNEY, [SEAL.]
Bvt. Maj. Gen. USA.
JOHN B. SANBORN, [SEAL.]
S. F. TAPPAN, [SEAL.]
C. C. AUGUR, [SEAL.]
Bvt. Maj. Genl.
ALFRED H. TERRY, [SEAL.]
Bvt. M. Gen. U.S.A.

Attest:
A.S.H. WHITE, *Secretary.*

[Signatures of Sioux Indians and Attestations omitted in Printing]

Executed on the part of the Brulé band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized, at Fort Laramie, D. T., the twenty-ninth day of April, in the year A. D. 1868.

Executed on the part of the Ogallalah band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized, at Fort Laramie, the twenty-fifth day of May, in the year A.D. 1868.

Executed on the part of the Minneconjon band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Executed on the part of the Yanctonais band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized:

Executed on the part of the Uncapa band of Sioux, by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Executed on the part of the Blackfeet band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Executed on the part of the Cutheads band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Executed on the part of the Two Kettle band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

Executed on the part of the Sans Arch band of Sioux by the chiefs and headmen whose names are hereto annexed, they being thereunto duly authorized.

Executed on the part of the Santee band of Sioux by the chiefs and headmen whose names are hereto subscribed, they being thereunto duly authorized.

And whereas, the said treaty having been submitted to the Senate of the United States for its consitutional action thereon, the Senate did, on the sixteenth day of February, one thousand eight hundred and sixtynine, advise and consent to the ratification of the same, by resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
February 16, 1869.

Resolved (two thirds of the senators present concurring), That the Senate advise ad consent to the ratification of the treaty between the United States and the different bands of the Sioux nation of Indians, made and concluded the 29th April, 1868.

Attest:

GEO. C. GORHAM,
Secretary.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the sixteenth of February, one thousand eight hundred and sixty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof I have hereto signed my name, and caused the seal of the United States to be affixed.

Done at the city of Washington, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Inde-
[SEAL.] pendence of the United States of America, the ninety-third.

ANDREW JOHNSON.

By the President:
WILLIAM H. SEWARD, *Secretary of State.*

44TH CONGRESS, 1ST SESSION. S. 590.

IN THE SENATE OF THE UNITED STATES.

MARCH 13, 1876.

Mr. ALLISON asked and, by unanimous consent, obtained leave to bring in the following bill; which was read twice, referred to the Committee on Indian Affairs, and ordered to be printed.

MARCH 15, 1876.

Reported by Mr. ALLISON with amendments, viz: Omit the parts struck through and insert the parts printed in *italics*.

A BILL

Providing for an agreement with the Sioux Nation in regard to a portion of their reservation, and for other purposes.

[Portion omitted in printing]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to appoint a commission consisting of three *five* persons, one of whom shall be an officer of the Army not of lower rank than brigadier general, *who shall be detailed for this service*, one of whom shall speak the Sioux language, and one of whom shall be learned in the law, whose duty it shall be to visit the various tribes of the Sioux, and state to them the changed condition of affairs with reference to their reservation since the ratification of the treaty of eighteen hundred and sixty-eight, growing out of the alleged discovery of gold in the Black Hills, and the desire of the United States to give them a proper equivalent for the use and occupation of the Hills by the whites, and the willingness of the United States to make an agreement with them which will provide for their subsistence and support by appropriations from year to year for a period not exceeding ten years; which

sum shall be expended from year to year for that purpose in such manner as Congress may by law provide, and which shall be in addition to the sums stipulated for, and provisions made by the treaty of eighteen hundred and sixty-eight, which have not already been expended. And the sums thus to be provided shall be in consideration for the absolute relinquishment by said tribes of all their title to, and interest in, the following district of country, that is, the tract of country lying between the North and South Forks of the Cheyenne River and west of the junction of said North and South Forks to the one hundred and fifth meridian of longitude west from Greenwich, and also the right of the United States to secure access to said last-mentioned tract, by means of wagon or other roads, from convenient and accessible points on the Missouri River, and by way of Fort Laramie, Wyoming Territory, in all not more than four in number; and said commission is hereby authorized to make with said tribes an agreement embracing the foregoing provisions, and the further provision that said tribes will thereafter receive all their supplies under such agreement, and under the treaty of eighteen hundred and sixty-eight, at such points and places on said reservation, and in the vicinity of the Missouri River, as the Department of the Interior may establish and provide; and also that said tribes will acquiesce in such methods as may be hereafter provided by law or adopted by the President to advance them in civilization and means of self-support.

SEC. 2. That all appropriations hereafter made for the subsistence of the Sioux Nation shall be upon condition that they will agree to the several provisions of the first section of this act; and after July first, eighteen hundred and seventy-six *seven* no money shall be expended for the subsistence of the Sioux Nation unless upon said conditions.

SEC. 3. That the homestead and pre-emption laws of the United States shall not apply to the country specifically described in the first section of this act until further action of Congress.

SEC. 4. That the Army officer detailed for the service required by the first section of this act shall not be allowed any compensation therefor, and each of the other *such* commissioners shall *each* receive ten dollars per day for thier services *while actually employed, and* Sec. 5. That said commissioners shall immediately enter upon their duties, and shall be authorized to employ a secretary, who shall be a stenographer, and *also* an interpreter, at a com-

pensation not exceeding seven dollars per day *each*, and shall make full report to the President at as early a day as practicable, which report, together with any agreement made with said Indian nation, shall be submitted to Congress for its approval; and such agreement, when so approved, and not before, shall be binding upon the United States and the Sioux Nation.

SEC. 5. That the Secretary of War be required to furnish transportation, subsistence, and protection to the said commissioners during the discharge of their duties; and the sum of ten *twenty* thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of any money in the Treasury not otherwise appropriated, as compensation for said commissioners, secretary, and intepreter herein provided for, and the incidental expenses thereof; *and the further sum of fifty thousand dollars is hereby appropriated to make suitable provision to aid the said commission in the discharge of the duties required by this act, and said sums shall be expended under the direction of the Secretary of the Interior.*

[Printer's No., 3732.

44TH CONGRESS, 1ST SESSION. **H.R. 3478.**

IN THE HOUSE OF REPRESENTATIVES

MAY 18, 1876.

Committed to a Committee of the Whole House on the State of the Union, made a special order therein after the bill of the House H.R. 3375 is disposed of, and ordered to be printed.

Mr RANDALL, from the Committee on Appropriations, reported the following bill:

A BILL

Making appropriations for the current, and contingent expenses of the Indian Department, and for fulfilling treaty-stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty-stipulations, with the various Indian tribes, namely, for the

[Portion omitted in printing]

SIOUX OF DIFFERENT TRIBES, INCLUDING SANTEE SIOUX STATE OF NEBRASKA.

For seventh of thirty installments, to purchase clothing for males over fourteen years of age; for flannel, hose, and calico, and domestics required for females over twelve years of age; and for such flannel and cotton goods as may be needed to make suits for boys and girls, per tenth article of treaty of April twenty-ninth, eighteen hundred and sixty-eight, one hundred and fifty-nine thousand four hundred dollars.

For pay of second blacksmith and for furnishing iron, steel, and other materials, per eighth article of the same treaty, two thousand dollars.

For pay of physician, five teachers, one carpenter, one miller, one engineer, and one blacksmith, per thirteenth article of same treaty, ten thousand four hundred dollars.

For pay of a matron, eight hundred dollars.

For seventh of thirty installments to purchase such articles as may be considered proper by the Secretary of the Interior, for Indians roaming and for Indians engaged in agriculture, one hundred and fifty thousand dollars.

For this amount, to be expended in the purchase of beef, flour, bacon, sugar, and coffee, in proportionate quantities, for thirty-five thousand persons, for subsistence of the Yankton Sioux and Poncas, and for purposes of their civili-

zation, one million dollars [*] *Provided*, That no portion of the appropriation hereby made for feeding the Sioux Indians, parties to the treaty of April twenty-ninth, eighteen hundred and sixty-eight, shall be available or be used for that purpose unless the said Indians shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the said treaty for said Indians.

* * * * *

* Senate Amendment, June 20, 1876, 4 Cong. Rec. 3902:

None of said sums appropriated for said Sioux Indians shall be paid to any tribe thereof while said tribe is engaged in hostilities against the white people; and only one-half of the last-named sum shall be available, or be used for the subsistence of said Indians, unless they shall first agree to relinquish all rights and claim to any country outside the boundaries of the permanent reservation established by the treaty of 1868 for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of 1868, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate: *And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self supporting: *Provided, further*, That the Secretary of the Interior may use of the foregoing amount the sum of $25,000 for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said tribe.

[Printer's No., 4061.

44TH CONGRESS, 1ST SESSION. **S. 590.**

[Report No. 674.]

IN THE HOUSE OF REPRESENTATIVES.

JUNE 15, 1876.

Reported with an amendment, recommitted to the Committee on Indian Affairs, and ordered to be printed.

Insert the part printed in *italics*.

AN ACT

Providing for an agreement with the Sioux Nation in regard to a portion of their reservation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That the President be, and he hereby is, authorized, by and with the advice and consent of the Senate, to appoint a commission, to consist of five persons, to visit, as soon as may be, the tribes of Sioux Indians, with a view to negotiating with them a treaty or agreement for the cession to the United States of the rights of said tribes to the country known as the Sioux reservation in Dacota and territory adjacent, or some portion thereof, or otherwise, for the preservation of peace. Each person so appointed (not being a salaried officer of the United States) shall be entitled to receive eight dollars a day and his actual and necessary travelling-expenses while engaged as such commissioner.

SEC. 2. That the sum of fifty thousand dollars, or as much thereof as shall be necessary, be, and the same is hereby, appropriated, to be expended under the direction of the President, to enable the tribes or their representatives to assemble and confer with said commissioners, and for the expenses of said commisioners.

SEC. 3. That said commissioners shall make full report to the President at as early a day as practicable, which report, together with any agreement made with said Indian nation, shall be submitted to Congress for its approval; and any agreement, when so approved, and not before, shall be binding upon the United States and the Sioux Nation.

SEC. 4. That the Secretary of War be required to furnish transportation, subsistence, and protection to the said commissioners during the discharge of their duties: *Provided, That the commissioners appointed under this act shall have no authority to make any treaty or agreement for the removal of the said Sioux Indians from their present reservation, but they shall be confined to their reservation or some part thereof.*

ACT OF AUGUST 15, 1876
19 STAT. 176

CHAP. 289.—An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty-stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Indian Department, and fulfilling treaty-stipulations with the various Indian tribes, namely:

[Portions omitted in printing]

[19 Stat. 191]

SIOUX OF DIFFERENT TRIBES, INCLUDING SANTEE SIOUX, STATE OF NEBRASKA.

For seventh of thirty instalments, to purchase clothing for males over fourteen years of age; for flannel, hose, and calico, and domestics required for females over twelve years of age; and for such flannel and cotton goods as may be needed to make suits for boys and girls, per tenth article of treaty of April twenty-ninth, eighteen hundred and sixty-eight, one hundred and fifty-nine thousand four hundred dollars.

For pay of second blacksmith and for furnishing iron, steel, and other material, per eighth article of the same treaty, two thousand dollars.

[19 Stat. 192]

For pay of physician, five teachers, one carpenter, one miller, one engineer, and one blacksmith, per thirteenth article of same treaty, ten thousand four hundred dollars.

For pay of a matron, eight hundred dollars.

For seventh of thirty instalments, to purchase such articles as may be considered proper by the Secretary of the Interior, for Indians roaming and for Indians engaged in agriculture, two hundred thousand dollars.

For this amount, for subsistence, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof

while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number; and unless they will receive all such supplies herein provided for, and provided for by said treaty of eighteen hundred and sixty-eight, at such points and places on their said reservation, and in the vicinity of the Missouri River, as the President may designate; and the further sum of twenty thousand dollars is hereby appropriated to be expended under the direction of the President of the United States for the purpose of carrying into effect the foregoing provision: *And provided also*, That no further appropriation for said Sioux Indians for subsistence shall hereafter be made until some stipulation, agreement, or arrangement shall have been entered into by said Indians with the President of the United States, which is calculated and designed to enable said Indians to become self-supporting: *Provided further*, That the Secretary of the Interior may use of the foregoing amounts the sum of twenty-five thousand dollars for the removal of the Poncas to the Indian Territory, and providing them a home therein, with the consent of said band.

For an industrial school at the Santee Sioux agency, three thousand dollars.

* * * * *

ACT OF FEBRUARY 28, 1877
19 STAT. 254

CHAP. 72.—An act to ratify an agreement with certain bands of the Sioux Nation of Indians and also with the Northern Arapaho and Cheyenne Indians.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a certain agreement made by George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, with the different bands of the Sioux Nation of Indians, and also the Northern Arapaho and Cheyenne Indians, be, and the same is hereby, ratified and confirmed: *Provided*, That nothing in this act shall be construed to authorize the removal of the Sioux Indians to the Indian Territory and the President of the United States is hereby directed to prohibit the removal of any portion of the Sioux Indians to the Indian Territory until the same shall be authorized by an act of Congress hereafter

[19 Stat. 255]

enacted, except article four, except also the following portion of article six: "And if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling-house" said article not having been agreed to by the Sioux Nation; said agreement is in words and figures following, namely: "Articles of agreement made pursuant to the provisions of an act of Congress entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and seventy-seven, and for other purposes," approved August 15, 1876, by and between George W. Manypenny, Henry B. Whipple, Jared W. Daniels, Albert G. Boone, Henry C. Bulis, Newton Edmunds, and Augustine S. Gaylord, commissioners on the part of the United States, and the different bands of the Sioux Nation of Indians, and also the Northern Arapahoes and Cheyennes, by their chiefs and headmen, whose names are hereto subscribed, they being duly authorized to act in the premises.

"ARTICLE 1. The said parties hereby agree that the northern and western boundaries of the reservation defined

by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows: The western boundaries shall commence at the intersection of the one hundred and third meridian of longitude with the northern boundary of the State of Nebraska; thence north along said meridian to its intersection with the South Fork of the Cheyenne River; thence down said stream to its junction with the North Fork; thence up the North Fork of said Cheyenne River to the said one hundred and third meridian; thence north along said meridian to the South Branch of Cannon Ball River or Cedar Creek; and the northern boundary of their said reservation shall follow the said South Branch to its intersection with the main Cannon Ball River, and thence down the said main Cannon Ball River to the Missouri River, and the said Indians do hereby relinquish and cede to the United States all the territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.

"ARTICLE 2. The said Indians also agree and consent that wagon and other roads, not exceeding three in number, may be constructed and maintained, from convenient and accessible points on the Missouri River, through said reservation, to the country lying immediately west thereof, upon such routes as shall be designated by the President of the United States; and they also consent and agree to the free navigation of the Missouri River.

"ARTICLE 3. The said Indians also agree that they will hereafter receive all annuities provided by the said treaty of 1868, and all subsistence and supplies which may be provided for them under the present or any future act of Congress, at such points and places on the said reservation, and in the vicinity of the Missouri River, as the President of the United States shall designate.

"ARTICLE 4. The Government of the United States and the said Indians, being mutually desirous that the latter shall be located in a country where they may eventually become self-supporting and acquire the arts of civilized life, it is therefore agreed that the said Indians shall select a delegation of five or more chiefs and principal men from each band, who shall, without delay, visit the Indian Territory under the guidance and protection of suitable persons, to be appointed for that purpose by the Department of the Interior, with a view to selecting therein a permanent home

for the said Indians. If such delegation shall make a selection which shall be satisfactory to themselves, the people whom they represent, and to the United States, then the said Indians agree that they will remove to the country so selected within one year from this date. And the said Indians do further agree in all things to submit themselves to such beneficent plans as the Government may provide for them in the selection of a country suitable for a permanent home, where they may live like white men.

[19 Stat. 256]

"ARTICLE 5. In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civlization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon,) one half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands with are suitable for cultivation, rations shall be issued only to the persons and families or those persons who labor, (the aged, sick and infirm excepted;) and as an incentive to industrious habits the Commissioner of Indian Affairs may provide that such persons be furnished in payment for their labor such other necessary articles as are requisite for civilized life. The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this

agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

"ARTICLE 6. Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment; and if said Indians shall remove to said Indian Territory as hereinbefore provided, the Government shall erect for each of the principal chiefs a good and comfortable dwelling-house.

"ARTICLE 7. To improve the morals and industrious habits of said Indians, it is agreed that the agent, trader, farmer, carpenter, blacksmith, and other artisans employed or permitted to reside within the reservation belonging to the Indians, parties to this agreement, shall be lawfully married and living with their respective familes on the reservation; and no person other than an Indian of full blood, whose fitness, morally or otherwise, is not, in the opinion of the Commissioner of Indian Affairs, conducive to the welfare of said Indians, shall receive any benefit from this agreement or former treaties, and may be expelled from the reservation.

"ARTICLE 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of this agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights of property, person, and life.

"ARTICLE 9. The Indians, parties to this agreement, do hereby solemnly pledge themselves, individually and collectively, to observe each and all of the stipulations herein contained, to select allotments of land as soon as possible after their removal to their permanent home, and to use their best efforts to learn to cultivate the same. And they do solemnly pledge themselves that they will at all times maintain peace with the citzens and Government of the United States; that they will observe the laws thereof and loyally endeavor to fulfill all the obligations assumed by them under the treaty of 1868 and the present agreement, and to this end will, whenever requested by the President of the United States, select so many suitable men from each

band to co-operate with him in maintaining order and peace on the reservation as the President may deem necessary, who shall receive such compensation for their services as Congress may provide.

[19 Stat. 257]

"ARTICLE 10. In order that the Government may faithfully fulfill the stipulations contain in this agreement, it is mutually agreed that a census of all Indians affected hereby shall be taken in the month of December of each year, and the names of each head of family and adult person registered; said census to be taken in such manner as the Commissioner of Indian Affairs may provide.

"ARTICLE 11. It is understood that the term reservation herein contained shall be held to apply to any country which shall be selected under the authority of the United States as the future home of said Indians.

"This agreement shall not be binding upon either party until it shall have received the approval of the President and Congress of the United States.

"Dated and signed at Red Cloud agency, Nebraska, September 26, 1876.

"GEORGE W. MANYPENNY.	[SEAL.]
"HENRY B. WHIPPLE.	[SEAL.]
"J. W. DANIELS.	[SEAL.]
"ALBERT G. BOONE.	[SEAL.]
"H.C. BULIS.	[SEAL.]
"NEWTON EDMUNDS.	[SEAL.]
"A. S. GAYLORD.	[SEAL.]

"Attest:

"CHARLES M. HENDLEY,

"*Secretary.*

"OGALLALLA SIOUX—CHIEFS AND HEADMEN.

"Marpiya-luta, (Red Cloud,) his x mark, seal.
"Taxunke-kokope, (Afraid-of-his-Horse,) his mark, seal.
"Xunka-luta, (Red Dog,) his x mark, seal.
"Taopi-cikala, (Little Wound,) his x mark, seal.
"Waxicun-taxunke, (American Horse,) his x mark, seal.
"Mato-kokopa, (Afraid-of-the-Bear,) his x mark, seal.
"Mato-yammi, (Three Bears,) his x mark, seal.

"Wakinyan-peta, (Fire-Thunder,) his x mark, seal.
"Mato-luza, (Fast Bear,) his x mark, seal.
"Kangi-ho-waxte, (Crow-with-a-good-voice,) his x mark, seal.
"Mato-ayuwi, (Turning Bear,) his x mark, seal.
"Itunkassan-waumli, (Weasel-Eagle,) his x mark, seal.
"Warp-xa, (Red Leaf,) his x mark, seal.
"Ixta-peta, (Fire Eyes, or White Bull,) his x mark, seal.
"Pte-san-wicaxa, (Man White Cow,) his x mark, seal.
"Kangi-tanka, (Big Crow,) his x mark, seal.
"Tatanka-waxte, (Good Bull,) his x mark, seal.
"Xunkikyuha, (Sorrel Horse,) his x mark, seal.
"Itunkasan-mato, (Weasel-Bear,) his x mark, seal.
"Wahukeza-nonpa, (Two-Lance,) his x mark, seal.
"Owe-xica, (Bad Wound,) his x mark, seal.
"Mato-wankantu, (High Bear,) his x mark, seal.
"Tokicu, (He-Takes-the-Enemy,) his x mark, seal.
"Akicita, (Soldier,) his x mark, seal.
"Ite-glega, (Stupid Face, or Slow Bull,) his x mark, seal.
"Xunmamto-wankantu, (High Wolf,) his x mark, seal.
"Si-tanka, (Big Foot,) his x mark, seal.

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"Wakinyan-ska, (White Thunder,) his x mark, seal.
"Xunki-to (Blue Horse,) his x mark, seal.

"ARAPAHOES

"Black Coal, his x mark, seal.
"Crazy Bull, his x mark, seal.
"Little Wolf, his x mark, seal.
"Sharp Nose, his x mark, seal.
"Six Feathers, his x mark, seal.
"White Horse, his x mark, seal.

"CHEYENNES

"Living Bear, his x mark, seal.
"Spotted Elk, his x mark, seal.
"Black Bear, his x mark, seal.
"Turkey Legs, his x mark, seal.
"Calfskin Shirt, his x mark, seal.

"Dated and signed at Spotted Tail agency, Nebraska, September 23, 1876.

"BRULE SIOUX

"Sinta-gleska, (Spotted Tail,) his x mark, seal.
"Mato-luza, (Swift Bear,) his x mark, seal.
"Nom-karpa, (Two Strike,) his x mark, seal.
"Wakinyan-ska, (White Thunder,) his x mark, seal.
"Heraka-najou, (Standing Elk,) his x mark, seal.
"Hi toto, (Blue Teeth,) his x mark, seal.
"Baptiste Good, his x mark, seal.
"Kangi-sapa, (Black Crow,) his x mark, seal.
"Taxunke-wakita, (Looking Horse,) his x mark, seal.
"Mato-ocin-xica, (Wicked Bear,) his x mark, seal.
"Wamli-cikala, (Little Eagle,) his x mark, seal.
"Xunka-luta, (Red Dog,) his x mark, seal.
"Tacampi-to, (Blue Tomahawk,) his x mark, seal.
"Xunka-luza, (Fast Dog,) his x mark, seal.
"Miwatani-hanska, (Tall Mandan,) his x mark, seal.
"Hitunkasan-luta, (Red Weasel,) his x mark, seal.
"Mato-wakan, (Sacred Bear,) his x mark, seal.
"Muggins, his x mark, seal.
"Ixnalawica, (Only Male,) his x mark, seal.
"Mato-can-wegna-iyaye, (Bear-in-the-wood,) his x mark, seal.
"Hobu, (Coarse Voice,) his x mark, seal.
"No Flesh, (Conica-wanica,) his x mark, seal.
"Mato-waukantu, (High Bear,) his x mark, seal.
"Wicampi-tanka, (Big-Star,) his x mark, seal.
"Akan-ka-kte, (Killed-on-horseback,) his x mark, seal.
"Wamnionmi-akicita, (Whirlwind Soldier,) his x mark, seal.
'Wakinyan-cangleska, (Ring Thunder,) his x mark, seal.
"Wakingan-wamli, (Thunder Eagle,) his x mark, seal.
"Xkeca-guaxkingan, (Crazy Mink,) his x mark, seal.
"Ho-waxte, (Good Voice,) his x mark, seal.
"Ta-kudankokipexni, (Afraid-of-nothing,) his x mark, seal.
"Cante-peta, (Fire heart,) his x mark, seal.
"Wapaswapi, (Roast,) his x mark, seal.
"Itecantku-ze, (Yellow Breast,) his x mark, seal.
"Maza-wanapinya, (Iron Necklace,) his x mark, seal.
"Sinte-gleska-holkxila, (Young Spotted Tail,) his x mark, seal.

"Mato-wanagi, (Bear Ghost,) his x mark, seal.
"Xunka-ixlala, (Lone Dog,) his x mark, seal.
"Pte-sanwicaxa, (White Buffalo man,) his x mark, seal.
"Maz-ixta, (Iron Eyes,) his x mark, seal.
"Asanpi, (Milk,) his x mark, seal.
"Cetanwamli, (Eagle Hawk,) his x mark, seal.

"I certify that the foregoing treaty was read and explained by me, and was fully understood by the above named Indians, before signing, and that the same was executed by the above Ogallalla Sioux, Cheyennes, and Arapahoes, at Red Cloud agency, on the 20th day of September, A.D. 1876, and by the Brule Sioux at Spotted Tail agency on the 23d day of September, A.D. 1876

"SAML. D. HINMAN,
"*Official Interpreter.*

"*Attest:*
"LOUIS BORDEAUX,
"WILLIAM GARNETT,
"WILLIAM ROLAND,
"HENERY C. CLIFFORD,
"*Interpreters.*

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the various bands of Sioux Indians receiving rations and annuities at the Standing Rock agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article four of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Standing Rock agency, Territory of Kakota, this 11th day of October, A.D. 1876.

"LOWER YANCTONAIS.

"Mato-nonpa, (Two Bears,) his x mark, seal.
"Tashunka-kokipapi, (He-fears-his-horse,) his x mark, seal.
"Waha, (Cotton Wood,) his x mark, seal.
"Hogna-duta, (Red Fish,) his x mark, seal.
"Mato-Gnashkinyan, (Mad Bear,) his x mark, seal.
"Cokamti, (Camp in Middle,) his x mark, seal.

"Tatanka-wanagi, (Bull's Ghost,) his x mark, seal.
"Waonzoege, (Pantaloons,) his x mark, seal.
"Mato chitika, (Brave Bear,) his x mark, seal.
"Can
Icu, (Drag Wood,) his x mark, seal.
"Iyayog-manni, (Walk out of the way,) his x mark, seal.
"Igmu-sapa, (Black Wild Cat,) his x mark, seal.
"Akicita cikala, (Little Soldier,) his x mark, seal.
"Canhpi-sapa, (Black Tomahawk,) his x mark, seal.
"Hahaka-maza, (Iron Elk,) his x mark, seal.
"Inyang-mani, (Running Walker,) his x mark, seal.
"Tashunka-witko, (Fol Dog,) his x mark, seal.
"Wanmli-napin, (Eagle Necklace,) his x mark, seal.

"UPPER YANCTONAIS

"Nasulau-tanka, (Big Head,) his x mark, seal.
"Shunkaha-napin, (Wolf Necklace,) his x mark, seal.
"Ishta-sapa, (Black Eye,) his x mark, seal.
"Tahinca-ska, (White Dear,) his x mark, seal.
"Tatanka-luta, (Red Bull,) his x mark, seal.
"Maga, (Goose,) his x mark, seal.
"Tacanonpa, (His Pipe,) his x mark, seal.
"Cante-witko, (Fool Heart,) his x mark, seal.
"Mato-wakantuya, (High Bear,) his x mark, seal.
"Tatanka-pa, (Bull Head,) his x mark, seal.
"Shunka-wanjila, (Lone Dog,) his x mark, seal.
"Nape-tanka, (Big Hand,) his x mark, seal.

"UNCPAPAS.

"Cetan-wakinyan, (Thunder Hawk,) his x mark, seal.
"Mato-cuwiyuksa, (Bear Rib,) his x mark, seal.
"Tatoke-inyanke, (Running Antelope,) his x mark, seal.
"He-maza, (Iron Horn,) his x mark, seal.
"Wakute-mani, (Walking Shooter,) his x mark, seal.
"Akicita-hanska, (Long Soldier,) his x mark, seal.
"Wicasha-wakan, (Medicine Man,) his x mark, seal.
"Ishta-ska, (White Eye,) his x mark, seal.
"Zitkala-sapa, (Black Bird,) his x mark, seal.
"Nape-shica, (Bad Hand,) his x mark, seal.
"Wahukeza-luta, (Scarlet Lance,) his x mark, seal.

"BLACKFEET

"Peji, (John Grass,) his x mark, seal.
"Kangi-iyotanka, (Sitting Crow,) his x mark, seal.
"Cante-peta, (Fire Heart,) his x mark, seal.
"Zitkala-wankantuya, (High Bird,) his x mark, seal.
"Nata-opi, (Wounded-Head,) his x mark, seal.
"Tashunka-luta, (Red Horse,) his x mark, seal.
"Cetan-luta, (Red Hawk,) his x mark, seal.

"Attest:
"R. E. JOHNSTON
"Captain First Infantry, Bvt. Lieut. Col.,
"U.S.A., Acting Indian Agent.

"W. D. WOLVERTON,
"Surgeon U.S.A.

"I certify that the foregoing agreement was read and explained by me, and was fully understood by the above named Sioux Indians before signing, and that the same was executed by said Sioux Indians at Standing Rock agency, Dak., on the 11th day of October, A.D. 1876.

"SAML D. HINMAN,
"Official Interpreter.

"Attest:
"LOUIS AGARD,
"WILLIAM HALSEY,
"E. H. ALLISON,
"Interpreters."

"The foregoing articles of agreement having been fully explained to us in open council, we, the chiefs and headmen of the various bands of Sioux Indians, receiving rations and annuities at the Cheyenne River agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Cheyenne River agency, Territory of Dakota, this 16th day of October, A.D. 1876.

"SANS ARC.

"Kangi-wiyaka, (Crow Feather,) his x mark, seal.
"Waanatan, (The Charger,) his x mark, seal.
"Cetan-gi, (Yellow Hawk,) his x mark, seal.
"Taku-kokipa-xni, (Fearless,) his x mark, seal.
"Wiyaka-luta, (Red Feather,) his x mark, seal.
"Ho-waxte, (Good Voice,) his x mark, seal.
"Itepxujahan, (Scare the Hawk,) his x mark, seal.
"Waiglu-xica, (Man that Hurts Himself,) his x mark, seal.
"Tatanka-ska, (White Bull,) his x mark, seal.
"Pehin-xaxa, (Red Hair,) his x mark, seal.

"BLACKFEET

"Mato-ayuwi, (Turning Bear,) his x mark, seal.
"Wakinyan-ska, (White Thunder,) his x mark, seal.
"Ixto-xakiya, (Red Arm,) his x mark, seal.
"Hehloga, (Yearling,) his x mark, seal.
"Pa-hoton, (Sounding Head,) his x mark, seal.
"Mahpiya-gleglega, (Striped Cloud,) his x mark, seal.
"Itoye-psunpsunla, (Awkward Face,) his x mark, seal.
"Maza-napin, (Iron Necklace,) his x mark, seal.

"TWO KETTLE.

"Mato-topa, (Four Bears,) his x mark, seal.
"Cuwi-hla-mani, (Rattling Ribs,) his x mark, seal.
"Mawatani-hanska-hokxila, (Long Mandan's Son,) his x mark, seal.
"Can-haha, (The Log,) his x mark, seal.
"Tacanhpi-luta, (Red Tomahawk,) his x mark, seal.
"Wokaye, (Brings the Food,) his x mark, seal.
"Mato-waaktonsya, (Forgetful Bear,) his x mark, seal.
"Xung-gleska-sapa, (Black Spotted Horse,) his x mark, seal.
"Xunka-wanjila. (The Lone Dog,) his x mark, seal.
"Hehaka-ska, (White Elk,) his x mark, seal.
"Mato-gleska, (Spotted Bear,) his x mark, seal.
"Ptesan-wanmli, (White Cow Eagle,) his x mark, seal.
"Mato wanmli, (Bear Eagle,) his x mark, seal.
"Mato-tanka, (Big Bear,) his x mark, seal.
"Cetan-luzahan, (Swift Hawk,) his x mark, seal.

"Wamniomni-luzahan, (Swift Whirlwind,) his x mark, seal.
"Taxunke-kokipapi, (Afraid-of-his-horse,) his x mark, seal.
"Hebola-nonpa, (Good Thunder,) his x mark, seal.
"Peji-to, (Green Grass,) his x mark, seal.
"Zitkala-kinyan, (Flying Bird,) his x mark, seal.
"Taxunka-maza, (Iron Horse,) his x mark, seal.
"Ptesan-wicaxa, (White Cow Man,) his x mark, seal.
"Sinte-nonpa, (Two Tails,) his x mark, seal.
"Kinyan-axapi, (Flying Laughing,) his x mark, seal.
"Inyan-hanksa, (Long Stone,) his x mark, seal.
"Natala, (Head,) his x mark, seal.
"Xungleska, (Spotted Horse,) his x mark, seal.
"Xiyo-sapa, (Black Prairie Chicken,) his x mark, seal.
"Wakuwa-mani, (Walking Hunter,) his x mark, seal.

"MINNECONJOU

"Magaska, (Swan,) his x mark, seal.
"Magakxica, (The Duck,) his x mark, seal.
"Cante-wanica, (No Heart,) his x mark, seal.
"Cante-wanica-wicahca, (Old Man No Heart,) his x mark, seal.
"Mahaka, (Standing Bear,) his x mark, seal.
"Ixnawasanica, (The Half,) his x mark, seal.
"Xina-ska, (White Robe,) his x mark, seal.
"Canhpi-sapa, (Black Tomahawk,) his x mark, seal.
"Mato-wankantuya, (High Bear,) his x mark, seal.
"Winkt-nonpa, (The Keg,) his x mark, seal.
"Kankaca-luta, (Red Plume,) his x mark, seal.
"Hehanskaska, (Long Horn,) his x mark, seal.
"Mato-waxte, (Good Bear,) his x mark, seal.
"Tatanka-pahakan-najin, (Bull on the Hill,) his x mark, seal.
"Xiyo-hanska, (Tall Prairie Chicken,) his x mark, seal.
"Cetan-gleska, (Spotted Hawk,) his x mark, seal.
"Inyan-boslahan, (Standing Rock,) his x mark, seal.
"Attest:

"CHARLES A. WICKOFF,
"Capt Eleventh Infantry.
"LESLIE SMITH
"Capt. First Infantry, Bvt. Major, U.S. Army

"WM. FIELDER,
"MARK WELLS,
"Interpreters.

"I certify that the foregoing agreement was read and explained by me, and was fully understood by the above named Sioux Indians before signing; and that the same was executed by said Sioux Indians at Cheyenne river agency, Dakota, on the 16th day of October, A.D. 1876.

"SAML. D. HINMAN,
"Official Interpreter.

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at Crow Creek agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

"Witness our hands and seals at Crow Creek agency, Territory of Dakota, this 21st day of October. A.D. 1876.

"LOWER YANCTONAIS

"Wanigi-ska, (White Ghost,) his x mark, seal.
"Wanmdi-sapa, (Black Eagle,) his x mark, seal.
"Wizi, (Old Lodge,) his x mark, seal.
"Najinyan-upi, (Surrounded,) his x mark, seal.
"Mato-watakpe, (Attacking Bear,) his x mark, seal.
"Mato-wakuwa-wicarca, (Old Man Running Bear,) his x mark, seal.
"Mato-wakuwa-hokxina, (Young Man Running Bear,) his x mark, seal.
"Katayapi, (Killed,) his x mark, seal.
"Mato-wakokipe-xni, (Fearless Bear,) his x mark, seal.
"Mato ska, (White Bear,) his x mark, seal.
"Waksuyemani, (Returns from War,) his x mark, seal.
"Kasde, (Splits,) his x mark, seal.
"Cagupska, (White Lungs or Bear Ghost,) his x mark, seal.
"Wanmdi-wicaxa, (Eagle Man,) his x mark, seal.
"Mato-cekiyapi, (They Worship the Bear,) his x mark, seal.

"Kangi-iawakan, (Sacred Talking Crow,) his x mark, seal.
"Cetan-koyagmani, (Walks With a Hawk,) his x mark, seal.
"Maga-bobdu, (Stormy Goose,) his x mark, seal.
"Wage-hunka, (Yellow Man,) his x mark, seal.
"Nakpa-wanjina, (One Ear,) his x mark, seal.
"Onspexni, (He Don't Know,) his x mark, seal.

"Attest:

"HENRY F. LIVINGSTON.
"FRANKLIN J. DE WITT.

"EDWD ASHLEY.
"H. BURT,
"ANTOINE LE CLARE,
"Interpreters.

"I certify that the foregoing agreement was read and explained by me, and was fully understood by the above-named Sioux Indians before signing; and that the same was executed by said Sioux Indians at Crow Creek agency, Dakota, on the 21st day of October, A.D. 1876.

"SAML D. HINMAN.
"Official Interpreter.

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at Lower Brule agency, in the Territory of Dakota, do hereby consent and agree to all the stipulations therein contained, with the exception of so much of article 4 of said agreement as relates to our visit and removal to the Indian Territory; in all other respects the said article remaining in full force and effect.

Witness our hands and seals at Lower Brule agency, Territory of Dakota, this 24th day of October, A.D. 1876.

"LOWER BRULES.

"Maza-oyate, (Iron Nation,) his x mark, seal.
"Tatanka-wakan, (Medicine Bull,) his x mark, seal.
"Ptesan-wicakte, (White Buffalo Cow,) his x mark, seal.
"Xiyocikala, (Little Pheasant,) his x mark, seal.
"Tatanka-pa, (Buffalo Head,) his x mark, seal.
"Marpiya-inajin, (Standing Cloud,) his x mark, seal.
"Cante-wicuwa, (Useful Heart,) his x mark, seal.

"Mato-xake-hanska, (Long Bear Claws,) his x mark, seal.
"Ixna-wica, (Only Man,) his x mark, seal.

"Attest

"HENRY E. GREGORY,
"I. D. DE RUSSY,
"Captain Second Infantry, U.S.A.
"ZEPHIR RENCOUNTRE,
"H BURT,
"Interpreters.

"I certify that the foregoing agreement was read and explained by me, and was fully understood by the above named Sioux Indians before signing; and that the same was executed by said Sioux Indians at Lower Brule agency, Dakota, on the 24th day of October, A.D. 1976.

"SAML. D. HINMAN,
"Official Interpreter.

"The foregoing articles of agreement having been fully explained to us in open council, we, the undersigned chiefs and headmen of the Sioux Indians, receiving rations and annuities at the Santee reservation, in Knox County, in the State of Nebraska, do hereby consent and agree to all the stipulations therein contained, saving, reserving, and excepting all our rights, both collective and individual, in and to the said Santee reservation, in said Knox County and State of Nebraska, upon which we, the undersigned, and our people are now residing.

"Witness our hands and seals at Santee agency, county of Knox, State of Nebraska, this 27th day of October, A.D. 1876.

"SANTEE

"Joseph Wabashaw, seal.
"Hakepwaxte, his x mark, seal.
"Wakute, (The Shooter,) his x mark, seal.
"Huxaxa, (Red Legs,) his x mark, seal.
"Marpiya-duta, (Red Cloud,) his x mark, seal.
"Wakaninihanku, his x, mark, seal.
"Wamanonsa, (The Thief,) his x, mark, seal.
"Star Frazier, his x mark, seal.
"Pepe, (Sharp,) his x mark, seal."Hehaka-maza, (Iron Elk,) his x mark, seal.

"Tunkanwaxtexte, (The Good Stone God,) his x mark, seal.
"Daniel W. Hemans, seal.
"Eli Abraham, seal.
"Geo. Paypay, seal.
"Artemas Ehuamani, his x mark, seal.
"James Paypay, seal.

"Attest:

"CHAS. H. SEARING.
"JOSEPH W. COOK.

"CHARLES MITCHELL,
"ALFRED L. RIGGS,
"Interpreters.

"I certify that the foregoing agreement was read and explained by me, and was fully understood by the above named Sioux Indians, before signing, and that the same was executed by said Sioux Indians at Santee agency, county of Knox, and State of Nebraska, on the 27th day of October, A.D. 1876.

"SAML. D. HINMAN,
"Offficial Interpreter."

Approved, February 18, 1877.

ACT OF OCTOBER 27, 1974
Pub. L. No. 93-494, 88 Stat. 1499

AN ACT

To authorize appropriations for the Indian Claims Commission for fiscal year 1975.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated not to exceed $1,450,000 to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1975.

SEC. 2. The first sentence of the last paragraph in section 2 of the Act of August 13, 1946 (60 Stat. 1050; 25 U.S.C. 70a) is hereby amended by striking the semicolon and the word "the" after the words "section 250 of title 28" and inserting in lieu thereof a colon and the following: "*Provided,* That expenditures for food, rations, or provisions shall not be deemed payments on the claim. The".

Approved October 27, 1974.

ACT OF MARCH 13, 1978
Pub. L. No. 95-403, 92 Stat. 153

An act to amend the Indian Claims Commission Act of August 13, 1946, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20(b) of the Act of August 13, 1946 (c. 959, 60 Stat. 1054), as amended, is hereby further amended by adding a new sentence at the end thereof, as follows: "Notwithstanding any other provision of law, upon application by the claimants within thirty days, from the date of the enactment of this sentence, the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission, entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo."

Approved March 13, 1978.

In The Supreme Court of the United States

No. 79-639

United States,

Petitioner,

v.

Sioux Nation of Indians, et al.

ORDER ALLOWING CERTIORARI. Filed December 10, 1979

The petition for a writ of certiorari to the United States Court of Claims is granted.

Supreme Court, U. S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, *et al., Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-639

UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, *et al., Respondents.*

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the Sioux Nation of Indians, *et al.,* respectfully request that this Court deny the petition for a writ of certiorari, which seeks review of the Court of Claims' decision in the Sioux Black Hills case. The opinion below is reported at 601 F.2d 1157 (Ct. Cl. 1979) and is reprinted in Appendix A (hereinafter "App. ——") of the petition at pp. 1a-70a.

STATEMENT

Over 100 years after the wrong occurred and more than 50 years after this suit first was instituted, the Court of Claims finally entered a judgment awarding the Sioux Nation just compensation under the Fifth Amendment for the 1877 taking of 7,345,157 acres of tribal reservation land, which the United States, by

treaty, had promised the Sioux forever. The events giving rise to the Black Hills claim, summarized in the findings of the Indian Claims Commission (*Sioux Nation* v. *United States,* 33 Ind. Cl. Comm. 151, 247-57 (1974)) and by the court below, constitute an unparalleled example of governmental bad faith and injustice that is even today the cause of much Indian resentment. In order to downplay this damaging background —so inimical to any argument for further judicial review—the petitioner's statement of the case omits or glosses over the following significant facts:

1. Under the Treaty of April 29, 1868, 15 Stat. 635, with the Sioux Nation, the United States promised that the Great Sioux Reservation would be "set apart for the absolute and undisturbed use and occupation of the Indians. . ." (Art. 2). In 1875, following the discovery of gold on the Indians' land, the President, the Secretary of the Interior and the Secretary of War commenced a concerted and, at least in part, unlawful campaign to coerce the Sioux into relinquishing the gold-rich Black Hills portion of the reservation. *United States* v. *Sioux Nation of Indians,* 518 F.2d 1298, 1299-1300 (Ct. Cl. 1975), *cert. denied* 423 U.S. 1076. First, the President secretly removed the troops guarding the Great Sioux Reservation and, in violation of Article 2 of the 1868 Treaty, permitted miners and settlers to invade the Black Hills. Second, the Secretary of the Interior prohibited the Sioux from hunting in the Powder River country outside their reservation, as they had a right to do under Articles 11 and 16 of the 1868 Treaty, and, when severe winter weather prevented the Sioux from returning to the reservation before the Government's deadline, the Secretary of War declared all Sioux outside the reservation to be "hostiles," meaning men, women and children could be shot on sight. Finally, the Sioux forced back onto the reservation were disarmed and dismounted, and thus deprived of any means of subsistence. Based upon such evidence,[1] showing the "duplicity of President Grant's course and the duress practiced on the starving Sioux," the Court of Claims said of the Government's conduct that "[a] more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history. . . ." 518 F.2d, *supra,* at 1302.

2. Under the 1868 Treaty, the United States further promised the Sioux that "[n]o treaty for the cession of any portion or part of the reservation . . . shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians . . ." (Art. 12). Eight years after this commitment was made—and at a time of national anger over General Custer's defeat at Little Big Horn—Congress attached a rider to the Indian Appropriations Act of August 15, 1876, 19 Stat. 176, 192, establishing a commission to treat with the Sioux for acquisition of the Black Hills country, but also providing that the Sioux would receive no further rations until they relinquished all rights out-

[1] Petitioner asserts (Pet. 6) that the court below ruled in this case "on the same record" considered in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942). This statement is not correct. In proceedings before the Indian Claims Commission, the Sioux submitted over 500 additional exhibits concerning the background of the 1877 Act, exclusive of valuation evidence, which had not been presented in the 1942 case. 518 F.2d at 1301. Indeed, as late as 1975, the Court of Claims took judicial notice of three newly-discovered documents proving President Grant's hitherto secret breach of the 1868 Treaty. *Id.* at 1299.

side the Great Sioux Reservation and ceded the Black Hills to the United States (App. 7a-8a). Although given this Hobson's choice of sell or starve, less than 10% of the adult male Sioux approved the so-called cession Agreement of September 26, 1876 (App. 8a, 25a). The Act of February 28, 1877, 19 Stat. 254, which transmuted the 1876 "Agreement" into law, thus effected the unilateral extinguishment of Sioux title to the Black Hills.[2] (App. 9a; 518 F.2d at 1300.)

3. The legislative history of the "sell or starve" rider to the Act of August 15, 1876, *supra,* which authorized negotiation of the 1876 "Agreement", demonstrates that Congress did not even relate, much less equate, the value of rations to be given the Sioux to the value of the Black Hills gold country (App. 18a-20a). Similarly, the legislative history of the 1877 Act reveals that Congress, in undertaking to provide rations to those Sioux who labored or attended school "until the Indians are able to support themselves", thought of this conditional promise as a substitute for the Indians' hunting, not as a reasonable equivalent for their land (App. 21a-24a). As the Court of Claims found, "[t]he terms upon which Congress acquired

[2] In petitioner's statement, the quintessential fact that the 1876 "Agreement" had been rejected by the Sioux is relegated to a footnote. Pet. 4, n.1. Thereafter, petitioner artfully blurs the critical distinction between claims grounded upon a unilateral taking of Indian reservation land, as in this case, which are cognizable under section 2, clause 1, of the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. 70a, and claims which would result if an otherwise valid treaty or agreement by which Indians consented to a land cession were revised on the ground of unconscionable consideration, which claims comprise the bulk of the cases presented to the Commission, are cognizable under section 2, clause 3, of that Act, and do not call for the payment of interest. *See, e.g.,* Pet. at 12-13.

the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price" (App. 25a).

In light of these additional facts, the real issue presented by this case is not accurately described in the question posed by petitioner.

QUESTION PRESENTED

Whether the United States, under circumstances constituting a legislative taking of private property, nonetheless need not pay just compensation under the Fifth Amendment because the land belongs to an Indian tribe and Congress has authorized some payment, no matter how arbitrary or inadequate in amount.

TREATY PROVISION INVOLVED

Article 12 of the Treaty of April 29, 1868, *supra,* between the United States and the Sioux Nation, provides in material part:

> No treaty for the cession of any portion or part of the reservation herein described [Great Sioux Reservation] which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same * * *.

REASONS FOR DENYING THE PETITION

1. The Decision Below Does Not Conflict With Lone Wolf Or Any Other Holding Of This Court.

Petitioner's principal argument for grant of the writ is its assertion that the decision of the Court of

Claims "is inconsistent with this Court's ruling in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903) . . ." (Pet. 8). The argument has no merit.

Lone Wolf v. *Hitchcock, supra,* was an action to enjoin the Secretary of the Interior from allotting and selling tribal land under a 1900 Kiowa-Comanche statute on the ground that the law was unconstitutional. The plaintiff Indians there contended that Congress possessed no right to divest the tribe of title unless three-quarters of the adult male Indians agreed in writing to the land cession, as required under the provisions of a treaty comparable to Article 12 of the 1868 Sioux Treaty. This Court held that Congress had the plenary power to break a treaty with an Indian tribe unilaterally. In so ruling, the Court declared that, since "Congress possessed full power in the matter, the judiciary cannot question or inquire into the motives which promoted the enactment of this legislation" (187 U.S. at 568). The case turned upon the constitutional power of Congress to act, not upon the legal or economic consequences which ultimately might flow from the disputed legislative action.

The Court in *Lone Wolf* had no occasion to pass upon whether the Kiowa-Comanche statute gave rise to a claim for just compensation under the Fifth Amendment because that question was not then open for adjudication.[3] The United States was not a party

[3] *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919), cited by petitioner for the proposition that "the Court . . . had to conclude that the challenged statute would work no unconstitutional taking, else an injunction would have issued" (Pet. 10), is not in point. The Court in *Lane* enjoined unauthorized Executive action, not the implementation of an act of Congress. *See also, United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 509-10 (1913).

and had not consented to suit. As the Court declared, "[i]f injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." 187 U.S. at 568. In 1903, of course, no court had jurisdiction to hear and determine Indian tribal claims, including taking cases. Pet. 7, n.7.

Respondents submit, therefore, that the decision below, which is limited to whether a taking occurred and just compensation thus is due, clearly does not and cannot conflict with *Lone Wolf*. Indeed, after a far more exhaustive analysis of the issues presented in *Lone Wolf* than would be appropriate for this Opposition, a majority of the Court of Claims,[4] sitting *en banc,* reached precisely this conclusion (App. 28a-33a). The opinion below also is consistent with, and fully supported by, all other decisions of this Court on Indian land claims.

Specifically, this Court has established in an unbroken line of cases that *Lone Wolf* does not preclude an award of just compensation under the Fifth Amendment—where Congress has subjected the United States to suit—whenever the Government, without the Indians' consent, acquires tribal land held by recognized title without payment of fair market value. *United States* v. *Klamath & Moadoc Tribes,* 304 U.S. 119 (1938); *Shoshone Tribe* v. *United States,* 299 U.S. 476 (1937); *United States* v. *Creek Nation,* 295 U.S. 103 (1935); *see also, Yankton Sioux Tribe* v. *United*

[4] Chief Judge Friedman, author of the opinion below, was joined by Senior Judge (and former Chief Judge) Cowen, Judge Davis and Judge Smith.

States, 272 U.S. 351 (1926).[5] In *Shoshone Tribe* v. *United States, supra,* the Court expressly juxtaposed the plenary power of Congress, as confirmed in *Lone Wolf,* with the constitutional obligation to pay just compensation, in the following terms:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 47 L. Ed. 299. The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation' " [citing *United States* v. *Creek Nation, supra,* and *Lane* v. *Pueblo of Santa Rosa, supra*]. (299 U.S. at 497.)[6]

[5] Prior to *Lone Wolf,* the Court had pointed out in *Cherokee Nation* v. *Southern Kansas RR. Co.,* 135 U.S. 641 (1890):

> "The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; *provided only, that they are not taken without just compensation being made to the owner.*" (135 U.S. at 657; emphasis added.)

This passage from *Cherokee Nation* was cited favorably in conjunction with *Lone Wolf* by the Court in *Federal Power Comm.* v. *Tuscarora Indian Nation,* 362 U.S. 99, 121-3 (1960).

[6] Given *Shoshone Tribe,* no basis exists for petitioner's contention, never thereafter explained, that the decision below "unduly restricts congressional power to manage Indian property" (Pet. 8). The standard for judicial review of legislation affecting Indian property is set forth in this Court's recent decisions in *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974), and *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 84-5 (1977). In *Mancari,* the Court made clear that acts of Congress will be sustained if "tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ." 417 U.S. at 555. This standard gives Congress ample latitude in its management of Indian property. But, as Mr. Justice Cardozo observed, speaking for a unanimous Court in *Shoshone Tribe:* "Spoliation is not management." 299 U.S. at 498.

Furthermore, the principle that the United States must pay just compensation under the Fifth Amendment for the unilateral extinguishment of tribal title to reservation land applies whether Congress has paid no consideration (*United States* v. *Creek Nation, supra*) or merely an inadequate consideration (*United States* v. *Klamath & Moadoc Tribes, supra*).[7] In short, based upon all prior precedents in this Court, the decision below is correct.

2. The Court Of Claims' Holding In This Case Turns Upon A Unique Set Of Facts And Establishes No Broad Precedent Which This Court Should Review.

(a) *The "good faith" test:* In an attempt to reconcile the plenary power of Congress, reflected in *Lone Wolf,* and the constitutional obligation to pay just compensation for the taking of tribal reservation lands, as determined in *Klamath, Shoshone Tribe* and *Creek Nation, supra,* the Court of Claims has established a "good faith" test for Fifth Amendment

[7] Petitioner tries to distinguish *Klamath & Moadoc Tribes* on the ground that the payment there made was "derisory." Pet. 11. Petitioner does not suggest how or where a constitutional line can be drawn between a "derisory" payment, as allegedly occurred in *Klamath,* and an "arbitrary" payment, as certainly occurred in this case—and no such line appears in any opinion of this Court. As the Court of Claims has declared, "[t]here is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined." *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 390 F.2d 686, 695 (Ct. Cl. 1968).

claims. In the lead case of *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 390 F.2d 686 (Ct. Cl. 1968), the court below concluded:

> . . . it is the good faith effort on the part of Congress to give the Indians the full value of their land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking. (390 F.2d at 693.)

The majority of the Court of Claims, as well as Judge Nichols in his concurring opinion, applied the above-described good faith test as the controlling precedent for determining whether a taking had occurred in this case (App. 9a-12a, 39a-48a).[8]

Initially, the *Fort Berthold* good faith test served the United States well. Thus, the court below denied the Fort Berthold Indians just compensation even though the Government, in an unconsented statutory acquisition, had paid only $1,661,954 for tribal reservation land having a fair market value of $4,427,021. *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States,* 204 Ct. Cl. 831 (1974), *affirming* 28 Ind. Cl. Comm. 264, 278-9 (1972); *see also, Klamath and Modoc Tribes* v. *United States,* 436 F.2d 1008,

[8] Respondents believe that the *Fort Berthold* good faith test is erroneous and that Indian tribes, like all other persons, are entitled to just compensation when the United States acquires their property without their consent for *any* amount less than fair market value. *See* pp. 15-18, *infra.* This question, however, need not be reached in considering the petition for a writ of certiorari because, even under the restrictive standard of the good faith test, the court below held the Sioux entitled to just compensation.

1015-17 (Ct. Cl. 1971). In other litigation involving inadequate consideration and a lack of tribal consent, however, the Court of Claims found that Congress had not made a good faith effort to pay the Indians a fair equivalent for their property and, accordingly, awarded interest as a measure of just compensation. *Confederated Salish and Kootenai Tribes* v. *United States,* 437 F.2d 458, 459-60 (Ct. Cl. 1971); cf. *United States* v. *Pueblo of Taos,* 515 F.2d 1404, 1405-6 (Ct. Cl. 1975).

In advising the Court that, "[t]o date, all successful claims based on inadequate consideration—as opposed to no payment at all—have been awarded without interest, with only the relatively insignificant exception of the school lands in the *Fort Berthold* case" (Pet. 13), petitioner seems to have forgotten *Confederated Salish and Kootenai Tribes, supra,* in which a taking was found when the United States had paid only $1,344,000 for property having a fair market value of $7,410,000 (437 F.2d at 469). This oversight perhaps explains petitioner's patently inaccurate contentions that "the pattern in the Court of Claims has been" to award just compensation only where no payment has been made (Pet. 11-12), and that the court below disregarded its own precedents (*id.* at 8). Actually, the Court of Claims has invoked the *Fort Berthold* good faith test in every Indian taking case under consideration since that rule was promulgated in 1968.

Petitioner's real complaint in this case is that the Court of Claims has decided on the facts that Congress failed the good faith test. On the basis of a massive evidentiary record, that court, in its 1975 opinion, properly characterized the Government's conduct giving rise to the Black Hills claim as probably the most

"ripe and rank case of dishonorable dealings . . . [to] be found in our history. . . ." (518 F.2d at 1302; *see* pp. 2-3, *supra.*) Similarly, after a detailed study of the legislative history of the 1877 Act and, more particularly, the "sell or starve" rider to the Appropriations Act of August 15, 1876, which authorized negotiation of the 1876 "Agreement" (App. 18a-24a), and a further analysis of the conditional commitments undertaken by the Government (*id.* at 26a-27a), a majority of the court below determined, and Judge Nichols emphatically concurred, that "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them." (App. 26a, 47a-48a; *see* pp. 4-5, *supra.*) Thus, contrary to petitioner's assertion (Pet. 10), the Court of Claims did not presume bad faith, but rather affirmatively found that Congress had not acted in good faith when it took Sioux land without attempting to pay fair market value. That ultimate factual conclusion, and not any issue of law, is the essence of the decision below and plainly does not warrant exercise of certiorari jurisdiction by this Court.[9]

[9] As a counter to the Court of Claims' finding, petitioner asserts that "rations valued at approximately $43 million were provided" the Sioux (Pet. 4), and that such payment "was in fact overgenerous" (*id.* at 11). Apart from the principle that what the United States eventually may have spent is irrelevant to whether a taking initially took place (App. 27a-28a), neither of petitioner's statements is true. First, as the court below correctly pointed out, the Government's claim that $43 million was expended for Sioux rations is contested by respondents (App. 9a), but was not litigated in view of the Act of October 27, 1974, 88 Stat. 1499, eliminating expenditures for "food, rations, or provisions" as an offset. Second, assuming such sum had been expended during the period 1877-1942 (*ibid*), $43 million over a 65-year period is only $661,154 per year or approximately $200,000 less each year than the $855,174 that the principal sum of $17,103,484, representing the fair market value of the Black Hills, would have earned at the agreed 5% interest rate. A substantial annual underpayment of just compensation is hardly "overgenerous."

(b) *Impact on other Indian claims:* In order to create the illusion that this case involves an important legal question, petitioner alleges that, when the Indian Claims Commission Act was adopted, Congress "presumably contemplated" that most Indian claims based upon recognized title would fall into the class of unconscionable consideration cases and that the decision below, if generally followed, "would defeat that expectation." Pet. 12, 13; *see* p. 4, n.2, *supra.* Petitioner cites no authority for this sweeping generalization concerning legislative intent, and no authority for the proposition in fact exists. The committee reports on H.R. 4497 of the 79th Congress, which became the Indian Claims Commission Act, certainly give no indication that Congress intended any particular class of claims to predominate and, far from favoring unconscionable consideration cases, the Senate Committee on Indian Affairs at one point deleted any specific reference to that basis for the Commission's jurisdiction from the pending bill.[10]

Petitioner's further contention that an unidentified "dozen cases still pending in the Court of Claims may be governed by the rule" applied in this case (Pet. 13)

[10] *See* Sen. Rep. No. 1715, 79th Cong., 2d Sess., p. 5 (1946); House Rep. No. 1466, 79th Cong., 1st Sess., pp. 10-11 (1945); House Rep. No. 2693 (Conference Report on H.R. 4497), 79th Cong., 2d Sess., pp. 1, 5-6 (1946).

appears equally inaccurate. As previously pointed out (pp. 10-11, *supra*), the decision below follows *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States, supra,* and *Confederated Salish and Kootenai Tribes* v. *United States, supra,* without breaking new legal ground. Petitioner suggests no reason why the Sioux opinion, unlike *Fort Berthold* and *Confederated Salish,* should lead to a rash of new Indian land taking claims.[11]

Moreover, true just compensation cases are especially rare in the Indian context. A Fifth Amendment claim does not arise, for example, where the United States acquires tribal land held by use and occupancy (aboriginal title), as contrasted with "recognized" or reservation title, no matter what the circumstances. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48 (1951). A taking also cannot occur where, as in most instances, the tribe consents to the cession, generally by a treaty or agreement. A Fifth Amendment claim arises solely in the unique situation where the United States has expropriated reservation property under authority of Congress without the consent of the tribe and without the payment of fair value. In view of these limitations, this Court, the Court of

[11] The deadline for filing claims before the Indian Claims Commission was August 13, 1951 (25 U.S.C. § 70k), so the unidentified "dozen cases still pending" mentioned by petitioner also had to be pending in 1971, when *Confederated Salish and Kootenai Tribes* was decided. Since that case, like the Sioux claim, involved the unilateral acquisition of reservation land for an arbitrary price (*see* p. 11, *supra*), counsel in the dozen remaining claims did not need to await the Sioux decision before realizing the Fifth Amendment potential of their cases. Given this situation, it seems strange that none of the purported dozen new Fifth Amendment cases has surfaced during the past eight years.

Claims and the Indian Claims Commission, collectively, have heard and finally determined fewer than a dozen different just compensation cases involving Indian recognized title lands during the past 40 years. Another twelve major Fifth Amendment claims are not likely to have remained dormant pending the outcome of the slow-moving Sioux Black Hills claim.[12]

Petitioner's argument that this case will have a material impact upon pending or future Indian claims cases, therefore, is wholly without foundation.[13]

3. The Rule In Taking Cases Which Petitioner Advocates Would Deny Indian Tribes The Equal Protection Of The Law.

Petitioner urges the Court to adopt the minority view of Judges Bennett and Kunzig in the lower court

[12] Over 600 claims were filed with the Commission by Indian tribes, bands and groups before the statutory deadline of August 13, 1951. Final Report of the United States Indian Claims Commission, August 13, 1946-September 30, 1978, p. 5. By the time the Commission's life expired, virtually all of the major land claims had been litigated, and the cases transferred to the court below most frequently covered accountings. *Id.* at 18-20. The "dozen cases still pending," to which petitioner refers, therefore, assuming they exist, must involve relatively minor land takings subsumed within a general accounting.

[13] Section 2 of the Indian Claims Commission Act covers claims arising before August 13, 1946, which had to be filed by August 13, 1951. 25 U.S.C. §§ 70a, 70k; *see* n.11, *supra.* Section 24 of the Indian Claims Commission Act authorizes the Court of Claims to hear and determine Indian claims arising after August 13, 1946 "under the Constitution, laws or treaties of the United States . . . ." 28 U.S.C. § 1505. Presumably, the Court of Claims seldom will receive land taking cases. In the modern era, Congress would break an Indian treaty without payment of fair market value only under the most extraordinary circumstances, since "[g]reat nations, like great men, should keep their word." *Federal Power Comm.* v. *Tuscarora Indian Nation, supra,* 362 U.S. at 142 (1960) (Justice Black, dissenting).

that, if Congress promises any payment for the unilateral acquisition of tribal recognized title lands, no matter how arbitrary or inadequate the amount, the courts may not question legislative wisdom and, therefore, may not determine that a taking has occurred for which just compensation is required under the Fifth Amendment. The dissenting opinion below is based upon the premise that, under *Lone Wolf,* Congress' exercise of its plenary power over Indian lands raises a political question. The dubious concept [14] that legislative action is thereby immunized from judicial scrutiny, however, was laid permanently to rest in Indian cases by this Court, at the request of the Solicitor General, in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 83-4 (1977). Specifically, the Court declared in *Delaware*:

> The statement in Lone Wolf, supra . . ., that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties [citation omitted], has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e.g., Morton v. Mancari, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed. 2d 290 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." (430 U.S. at 84; citations omitted.)

The Court of Claims thus held correctly that the Act of February 28, 1877, *supra,* which effected the uni-

[14] *See* Henkin, "Is There a 'Political Question' Doctrine?", 85 Yale L.J. 597 (1976); Tribe, *American Constitutional Law,* 71-79 (1978).

lateral acquisition by the United States of the Sioux Black Hills country, similarly was open to judicial scrutiny to determine whether such legislation violated the just compensation clause of the Constitution.

Any other result would deny respondents the equal protection of the law.[15] The standard rule in condemnation cases is, of course, that the owner of acquired property has a right to receive its fair market value as of the date of taking, plus interest as a measure of just compensation from such date to the date of payment. In arguing that the Sioux should be denied just compensation, petitioner proposes a new rule saying, in effect, that the United States owes a significantly lesser constitutional duty to Indians, for whom it acts as trustee, then it owes to other citizens, for whom it has no special obligations.

Such a rule simply cannot be justified. No person other than an Indian tribe would be subject to this disability in eminent domain cases. Apart from the obvious denial of equal protection involved, the rule would reverse the "overriding duty of our Federal

[15] Petitioner's proposed rule also would deprive Indian tribes of a right to any recovery if, in a contemporary treaty abrogation, Congress were to make some payment for reservation land, but substantially less than its fair market value. The Court of Claims has jurisdiction over Fifth Amendment takings arising after August 13, 1946. *See* n. 13, *supra.* The court below, however, does not have jurisdiction over unconscionable consideration or fair and honorable dealings claims. *Menominee Tribe of Indians* v. *United States,* —— F.2d —— (Ct. Cl., October 17, 1979) (slip op. at 8). Petitioner thus would take the courts back to the days before passage of the Indian Claims Commission Act when Indian tribes had to seek special jurisdictional acts in order to have their claims determined—the very practice which Congress, in 1946, intended to end.

Government to deal fairly with Indians." *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). Indeed, if any special rule were appropriate, Indian property rights would be entitled to greater than ordinary protection since, as was stated in *Seminole Nation* v. *United States,* 316 U.S. 286 (1942), under a "self-imposed policy which has found expression in many acts of Congress and numerous decisions of this Court," the Government's conduct towards Indian tribes must be "judged by the most exacting fiduciary standards." 316 U.S. at 296-7.

Finally, in a further effort to cloak this case with a significance which it does not possess, petitioner argues that the Sioux award "represents a substantial and unwarranted charge against the public fisc and invites like awards in other pending cases" (Pet. 8, 13).[16] The reason why the judgment in this case is so large is that the Government has waited more than 102 years to pay just compensation. The lesson to be learned from such a situation is that the United States should pay its debts on time, not that the victims of delay should be denied their Fifth Amendment rights.

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[16] As is pointed out at pp. 13-15, and ns. 12 and 13, *supra*, the decision below is not likely to have a material impact upon either pending or future Indian land claims cases. Petitioner's observation that the award of interest "multiplies the basic award six-fold, to reach a total of some $105 million" (Pet. 13), is equally inappropriate. During the period 1877 to September 1979, the Consumer Price Index escalated from 32 to 223.4 (on a base of 1967=100), so that the purchasing power of the dollar has dropped seven-fold and the basic award with interest today is worth less than the fair market value of the Black Hills when taken.

CONCLUSION

For the foregoing reasons, respondents urge that the petition for a writ of certiorari be denied. Alternatively, respondents suggest that the petition be granted and that the decision below be summarily affirmed on the authority of *United States* v. *Klamath and Moadoc Tribes, supra,* and *Shoshone Tribe* v. *United States, supra,* as illuminated by *Delaware Tribal Business Comm.* v. *Weeks, supra.*

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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 1a-70a) is reported at 601 F.2d 1157. The opinion of the Indian Claims Commission (A. 264-315) is reported at 33 Ind. Cl. Comm. 151.

JURISDICTION

The opinion of the Court of Claims, determining liability against the United States, was filed on June 13, 1979 (Pet. App. 1a-70a). On July 31, 1979, a

final judgment against the United States was entered (Pet. App. 71a-73a). On September 11, 1979, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including October 29, 1979. The petition was filed on October 17, 1979, and granted by this Court on December 10, 1979 (A. 349). The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether legislation which divests an Indian tribe of a portion of its lands in consideration of an undertaking to provide material assistance and food rations until the Indians are able to support themselves is a "taking" under the Just Compensation Clause of the Fifth Amendment so as to entitle the tribe to interest on a later award for the value of the lands.

STATUTES AND TREATIES INVOLVED

The Act of February 28, 1877, ch. 72, 19 Stat. 254, set forth in full at pages 331-346 of the Appendix, provides in pertinent part:

> That a certain agreement * * * is hereby ratified and confirmed * * *.
>
> *Article 1.* The said parties hereby agree that the northern and western boundaries of the reservation defined by article 2 of the treaty between the United States and different tribes of Sioux Indians, concluded April 29, 1868, and proclaimed February 24, 1869, shall be as follows * * * and the said Indians do hereby relinquish and cede to the United States all the

> territory lying outside the said reservation, as herein modified and described, including all privileges of hunting; and article 16 of said treaty is hereby abrogated.
>
> * * * * *
>
> *Article 5.* In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual * * *. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. * * * The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.
>
> * * * * *

The Treaty of April 29, 1868, 15 Stat. 635, and pertinent provisions of the Act of August 15, 1876, ch. 289, 19 Stat. 176, are set forth in the Appendix (A. 317-330).

STATEMENT

As this case returns to the Court, the only question is whether the Sioux Nation is entitled to interest since 1877 on an award of some $17 million, representing the value of the Black Hills severed from the Great Sioux Reservation in that year. There is no dispute as to valuation, or as to offsets. Nor does the United States contest the award of $17 million. What is more, it is common ground that the interest issue turns entirely upon whether the severance of the Black Hills in 1877 constituted a "taking" by the United States within the scope of the Just Compensation Clause of the Fifth Amendment. It does not follow, however, that the factual setting of the controversy can be stated shortly. In our view, at least, it is necessary to retrace in some detail the historical events that led to the removal of the Black Hills from the Sioux Reservation and briefly to describe the judicial proceedings that preceded the present suit.

A. Historical Background

1. *The Fort Laramie Treaty of 1851*

At the time of the Louisiana Purchase in 1803, the various bands of the Sioux Indians occupied, with other tribes, a large area of land in the territory now comprising the States of Minnesota, Iowa, South Dakota, North Dakota, Nebraska, Wyoming and Montana, and, of this area, the mountainous region now known as the Black Hills in South Dakota, was a part (A. 202). The discovery of gold in California in 1848 resulted in a tide of emigration, some of

which passed through Wyoming and Nebraska where several bands of the Sioux and other Indians lived, roamed, and hunted. This provoked the Treaty of September 17, 1851, 11 Stat. 749. Article 5 of this treaty recognized a defined territory as exclusively belonging to each nation. The Sioux territory comprised South Dakota and parts of what is now Nebraska, Wyoming, North Dakota and Montana (A. 202-204). See also 2 Ind. Cl. Comm. 646 (1954).

2. *The Treaty of 1868*

The discovery of gold in Montana in 1861 resulted in a further tide of white emigration through the territory occupied by the Sioux Indians, as described in the 1851 treaty (A. 205). This line of travel was northward from the California Trail, near old Fort Laramie, Wyoming, along the valley of the Powder River, to and across the Yellowstone River and westward into the gold fields of Montana (*ibid.*). Disputes and conflicts arose with the Indians over this route on account of the large number of white travelers passing along it, and between 1861 and 1867, there were a number of military engagements between the Government and the Sioux Indians culminating in the so-called Powder River War of 1866-1867 (*ibid.*). Following the Powder River War, the United States and the various bands of the Sioux Indian Tribe concluded a treaty on April 29, 1868, which was ratified February 16, 1869, and proclaimed February 24, 1869 (15 Stat. 635, 640).[1]

---

[1] This treaty was negotiated, made, and ratified pursuant to the Act of Congress of July 20, 1867, ch. 32, 15 Stat. 17. Sec-

Two aspects of the treaty are at the root of this case. One was the solemn promise of the United States to respect the territorial integrity of the Great

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tion 2 of the Act directed the negotiating commission "to examine and select a district or districts of country having sufficient area to receive all the Indian tribes now occupying territory east of the Rocky Mountains, not now peacefully residing on permanent reservations under treaty stipulations, to which the government has the right of occupation or to which said commissioners can obtain the right of occupation, and in which district or districts there shall be sufficient tillable or grazing land to enable the said tribes, respectively, to support themselves by agricultural and pastoral pursuits. Said district or districts, when so selected, and the selection approved by Congress, shall be and remain permanent homes for said Indians to be located thereon, and no person(s) not members of said tribes shall ever be permitted to enter thereon without the permission of the tribes interested, except officers and employees of the United States: Provided, That the district or districts shall be so located as not to interfere with travel on highways located by authority of the United States, nor with the route of the Northern Pacific Railroad, the Union Pacific Railroad, the Union Pacific Railroad Eastern Division, or the proposed route of the Atlantic and Pacific Railroad by the way of Albuquerque." 15 Stat. 17.

In the fall of 1867, the treaty commissioners submitted a proposed treaty to a large number of the leaders and members of the Sioux Indians at Fort Laramie (A. 206). The negotiations between the commissioners and the leaders and members of the various bands of the Sioux Tribe of Indians continued in the spring of 1868 (*ibid.*). Upon the insistence of the Indians certain concessions were made by the commissioners representing the United States (*ibid.*). As a result the treaty was signed by the portion of the Sioux chiefs, leaders, and members of the tribe at Fort Laramie on April 29, 1868, and the treaty was subsequently agreed to at various following dates by Sioux chiefs, leaders, and members of all the remaining bands of the Sioux Tribe (A. 206-207).

Sioux Reservation established by the treaty. Article II of the treaty set aside "for the absolute and undisturbed use and occupation of the Indians" the Great Sioux Reservation located in what is now the entire state of South Dakota west of the Missouri River, including the Black Hills (A. 207-208). The United States agreed that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in [that] territory" (*ibid.*). Article XII provided that no further cession of any reservation lands of the Sioux "shall be of any validity or force" unless executed and signed by at least three-fourths of the adult male Indians occupying or interested in those lands (A. 210).[2]

Second, the treaty contemplated that the Sioux would become self-supporting on the reservation before the expiration of the assistance required by the treaty to be rendered by the Government. Thus, in Articles VII and VIII the United States agreed to equip the Sioux who settled on the reservation for farming and to furnish them needed facilities and assistance in that connection, to furnish them educational facilities for not less than 20 years, and for a period of 30 years to furnish each Indian with articles of clothing, etc., and to pay the sum of ten dollars for each Indian "while such persons roam and hunt," and twenty dollars "for each person who en-

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[2] In Articles XI, XV, and XVI the Sioux were also given the right to hunt on certain lands in Nebraska north of the Platte River and in the Powder River areas (A. 209-210).

gages in farming" to be used for the purchase of such articles as from time to time the conditions and necessities of the Indians might indicate to be proper (A. 321-322). In addition to all the other provisions of the treaty, the United States agreed, in Article X, to appropriate and expend annually such sum as might be necessary for the subsistence of the Indians of the Sioux Tribe on the reservation for a period of four years (A. 323).[3]

3. *The Failure Of The Sioux To Achieve Self-Sufficiency*

Pursuant to the requirement of Article X to supply subsistence rations to the reservation Sioux until 1873, Congress appropriated more than $5 million in subsistence rations between 1868-1872. The last such appropriation was made on February 14, 1873, for the fiscal year ending June 30, 1874. 17 Stat. 437, 456. The Sioux, however, had clearly not become self-supporting (A. 140-141, 151, 237). It is undisputed that Congress was under no treaty or other obligation to provide subsistence to the Sioux after June 30, 1874. Nonetheless, in each of the two following years, $1.1 million or more was gratuitously appropriated for their subsistence (Pet. App. 6a). The Sioux were, by virtue of their failure to achieve self-sufficiency, dependent on these rations (A. 45, 140, 141, 151, 237). The failure of the Sioux to achieve self-sufficiency, their desperate need for some

[3] In a separate proceeding, the Indian Claims Commission awarded the Sioux Nation $43.9 million for the cession of lands effected by the 1868 treaty. 42 Ind. Cl. Comm. 214, 257 (1978). That decision is now on appeal to the Court of Claims.

guaranteed means of survival, and a plan calculated to lead to economic independence were difficulties that the 1877 legislation at issue in this case sought to solve.

4. *Efforts To Prevent Illegal Entries By Miners Into The Black Hills*

The Black Hills "rise like an island from an ocean of grass-covered and treeless plains" in the southwest corner of South Dakota between the north and south forks of the Cheyenne River (A. 155, 224). One of the major factors that eventually persuaded Congress to remove the Black Hills from the reservation was the ever increasing difficulty, even with the use of military force, in preventing that area from being overrun by prospectors in search of gold in violation of Article II of the 1868 treaty.

Well before the 1868 treaty, gold had been found by whites in the Black Hills (A. 308).[4] In the sum-

[4] There is evidence that mining and trapping parties entered the Black Hills area as early as the 1830's and 1840's. During the early 1850's, prospecting parties enroute to California mined in the Black Hills and recovered gold. In 1857 Lt. G. K. Warren, a topographical engineer, led a reconnassiance expedition into Sioux country. In the Black Hills area, Lt. Warren discovered gold. In his report he also noted that the area was watered by beautiful flowing streams, and that it contained rich valleys capable of cultivation and ample timber and other building materials. 33 Ind. Cl. Comm. 151, 245-246 (1974). During 1865 a military expedition enroute to the Powder River area passed through the northern Black Hills. Many specimens of gold-bearing quartz were discovered. In 1866, Dr. Ferdinand V. Hayden led a scientific expedition into the hills. Dr. Hayden reported that it could be found "in almost every stream." *Id.* at 247.

mer of 1874, an expedition commanded by Lt. Col. Custer explored the Black Hills and confirmed the presence there of gold in paying quantities (A. 14-19, 82-93).[5] Reports of this discovery, coupled with knowledge of the other resources of the Black Hills and their ready accessibility to whites,[6] produced a massive influx of prospectors, miners and settlers who entered the area without the consent of the Sioux or the United States (Pet. App. 6a; A. 211).

Although the 1868 treaty provided that no one other than the Sioux and designated officers of the government would be "permitted" in the reservation (A. 208), the treaty did not describe the degree of military force that the United States was required to use to prevent violations of the treaty. Nonetheless, for nearly a decade the United States increasingly

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[5] The Custer expedition entered the Black Hills, among other reasons, to locate suitable sites for military posts to assist in preventing depredations by the hostile bands of the Sioux who travelled through the Black Hills to attack friendly settlements (A. 15, 21). This expedition was, in the view of the Acting Secretary of the Interior, permitted by the 1868 treaty (A. 20, 65). A report made by Custer on the expedition appears at S. Exec. Doc. No. 32, 43d Cong., 2d Sess. (1875).

[6] As the Court of Claims found in 1942 (A. 212):

> At the time the Black Hills area was surrounded on almost all sides by white settlements; railroads were in operation, the Union Pacific to the south and the Northern Pacific to the north of the Black Hills; and the Missouri River carried a heavy traffic in steamboats. Thus, facilities were open to white citizens to within comparatively short distances of the Black Hills' gold fields.

used military force to attempt to find and to expel prospectors until it became clear that there was no military solution. As early as 1868, General Terry, who commanded the Department of the Dakota, advised miners planning expeditions to the Black Hills that their invasion would be resisted by military force (A. 4, 308). In 1872, similar mining expeditions were formed at Yankton, Dakota Territory. In response, the territorial governor, at the request of the Secretary of the Interior, issued a proclamation on April 6, 1872, that such expeditions would "not only be illegal, and likely to disturb the peace between the United States and [the Sioux] but * * * the Government will use so much of its civil and military as may be necessary to remove from this Indian Territory all persons who go there in violation of law" (A. 4-7).

When reports that the 1874 Custer expedition had found gold in paying quantities in the Black Hills accelerated unlawful attempts to enter Indian country, the government stepped up its efforts to prevent them. On September 3, 1874, General P. H. Sheridan, commanding the military division of the Missouri, ordered Generals Terry and Ord "to use the force at your command to burn the wagon-trains, destroy the outfit, and arrest the leaders, confining them at the nearest military post in the Indian country" (A. 19, 62, 63, 218) and these orders were published in local newspapers (A. 63). Shortly thereafter, similar instructions to prevent invasions and to remove miners were issued by the Secretary of War (A. 24-26, 80),

the Secretary of the Interior (A. 20-21, 218), and the President (A. 25, 79, 218).

Pursuant to these orders, patrols were dispatched to retrieve expeditions of miners reportedly moving into Indian country (A. 21, 24, 37, 49, 62, 66, 72),[7] their wagons were burned by the army (A. 62)[8] roads into the Black Hills were blocked to "starve out" the miners (A. 49), the Army evicted miners from their claims in the Black Hills and escorted them out (A. 37-38), some offenders were incarcerated (A. 38, 62), and, in general, "very stringent measures" were applied by the Army to enforce the treaty (A. 37-38). See S. Exec. Doc. No. 2, 43d Cong., Spec. Sess. (1875). In sum, by 1875, the "principal object of the military movements" in the Army Departments of the Dakota and the Platte was "to guard" the Black Hills "from the intrusion of those adventurers who, in defiance of law and the treaty obligations of the Government, have persistently attempted to invade that region in search of gold" (A. 38).[9]

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[7] The Army pursued miners in the Black Hills in the winter of 1874-1875 in temperatures "ranging from twenty to forty degrees below zero in the day-time" (A. 73-74).

[8] See also Dep. of William Wade at 199.

[9] Another principal duty was "protecting the settlements from the raids of hostile Indians" (A. 37) (see pages 37 to 40, *infra*).

During this period the Department of the Interior received numerous requests for information concerning the Black Hills to which the Department consistently replied that under the 1868 treaty no white person was permitted in the Black Hills without the consent of the Sioux and the United States (A. 24-26). The Department also refused petitions from miners evicted from the Black Hills to recognize their claims and allow them to return (A. 35-36).

5. *The Impracticality of Preventing The Miners' Intrusion*

By 1875, it became clear, as the court below stated, that these military "endeavors were largely unsuccessful" (Pet. App. 6a). In his annual report for that year the Commissioner of Indian Affairs observed that "notwithstanding the stringent prohibitory orders by the military authorities, and in the face of the large military force which has been on duty in and around the hills during the summer, probably not less than a thousand miners, with the number rapidly increasing, have made their way into the Sioux country" (A. 29, 30). He concluded: "However unwilling we may be to confess it, the experience of the past summer [of 1875] provides either the inefficiency of the large military force under the command of such officers as Generals Sheridan, Terry, and Crook, or the utter impracticability of keeping Americans out of a country where gold is known to exist by any fear of orders or of United States cavalry, or by any consideration of the rights of others" (A. 29, 150-151). In a similar vein, the governor of the Dakota Territory wrote the Secretary of the Interior on June 8, 1875, that "[t]he whole country is red hot on the Black Hills question * * *. Small squads continue to leave Sioux City, Yankton, and other points to invade the reservations, and the volume will increase * * *" (A. 28). General Sheridan "earnestly recommend[ed] some

action which will settle this Black Hills question, and relieve us from an exceedingly disagreeable and embarrassing duty" (A. 37). In short, by 1875 it was "apparent * * * that occupancy of the Black Hills by nonIndians was inevitable * * *" (A. 310).

In these circumstances, on November 3, 1875, President Grant decided that while the orders forbidding entry into the Black Hills by miners should remain effective, "no further resistance by the military should be made to the miners going in" because "such resistance only increased [the miner's] desire and complicated the troubles" (A. 59). The President requested that this decision not be publicized to the miners or anyone else (*ibid.*).[10] From this point on the United States pursued a policy of seeking to solve the Black Hills problem by negotiated settlement.[11]

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[10] The troops withdrew from patrols in the Black Hills in December 1875 and returned to their military posts. During the winter months, entry by miners was effectively prevented by the winter weather (A. 77, 230).

[11] The Court of Claims stated, "[t]he government apparently believed that the Sioux's needs for the rations the government had been supplying them would prevent the Indians from making trouble" (Pet. App. 6a-7a). Although the dependency of the Sioux on the rations was recognized by certain officials (see A. 60, 139-140), there is no evidence, so far as we are aware, that demonstrates that President Grant withdrew the troops from the Black Hills simply because the Sioux were in no position to "make trouble."

6. *1875 Negotiations To Acquire The Black Hills*

Well before the President discontinued military force, the United States had been actively negotiating with the Sioux to purchase the Black Hills and thereby eliminate the treaty violations by prospectors as well as provide compensation to replace the material assistance no longer available under the treaty. In his annual report for 1875 the Commissioner of Indian Affairs recommended legislation "offering a fair and full equivalent" for the Black Hills (A. 29-30, 151-152):

> [I]f [the Sioux] were an independent, self-supporting people, able to claim that hereafter the United States government should leave them entirely alone, in yearly receipt of such annuities only as the treaty of 1868 guarantees, they would be in a position to demand to be left in undisturbed possession of their country, and the moral sense of mankind would sustain the demand; but unfortunately the facts are otherwise. They are not now capable of self-support: they are absolute pensioners of the Government in the sum of a million and a quarter of dollars annually above all amounts specified in treaty-stipulations. A failure to receive Government rations for a single season would reduce them to starvation. They cannot, therefore, demand to be left alone, and the Government, granting the large help which the Sioux are obliged to ask, is entitled to ask something of them in return. On this basis of mutual benefit the purchase of the Black Hills should proceed. If [negotiations fail], I would respectfully recommend that legis-

> lation be now sought from Congress, offering a fair and full equivalent [for the Black Hills], a portion of which equivalent should be made to take the place of the free rations now granted.

Many years later the Indian Claims Commission valued the Black Hills area at $17.1 million, a valuation all parties now accept as its value in 1877. But in 1875 the Black Hills was largely an unknown territory of unknown value. In March 1875 President Grant directed a survey of the area be undertaken "[i]n order to provide for the question of a fair equivalent for this country * * *" (A. 27, 151). This survey was begun March 1875 by Walter P. Jenney (A. 26-27, 151). His voluminous preliminary report in November 1875, although not specifying even an approximation of the worth of the Black Hills, stated that the Black Hills contained not only gold but also excellent timber, agricultural, and grazing lands. S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876) (A. 153-158). On the basis of the Jenney Report, the Commissioner of Indian Affairs concluded as follows concerning the proper measure of the consideration due the Indians for yielding up this area (A. 28, 229): [12]

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[12] The Commissioner deemed it irrelevant that the Sioux were then making little use of the Black Hills' resources (A. 229):

> The fact that these Indians are making but little if any use of the Black Hills has no bearing upon the question of what is a fair equivalent for the surrender of these rare facilities for farming and grazing. They are children, utterly unable to comprehend their own great necessities just ahead; they cannot, therefore, see that the country which now only furnishes them lodge-poles and a few antelope has abundant resources for their future wants, when they shall cease to be barbarous pensioners upon the Government and begin to provide for their own living. Their ignorance of themselves and of true values makes the stronger appeal to our sense of what is right and fair.

> The true equivalent to be offered the Sioux, as helpless wards of the Government, for the Black Hills will be found by estimating what eight hundred square miles of gold fields are worth to us, and what three thousand square miles of timber, agricultural, and grazing lands are worth to them.

The negotiations themselves began in May and June 1875 when a delegation of Sioux met, at their request (A. 75), with President Grant and the Secretary of the Interior at the White House (A. 213).[13] The President stated to the delegation (A. 213-215):

> In regard to the Black Hills, I look upon it as very important to them (the Indians) to make some treaty by which, if gold is discovered in large quantities, the white people will be al-

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[13] The United States also sought to obtain Sioux relinquishment of the right to hunt in certain areas outside the reservation (A. 222). An earlier attempt to obtain this concession resulted in an agreement to relinquish all hunting rights in Nebraska. In 1874, Congress enacted legislation to establish a commission to purchase the hunting lands in Nebraska for $25,000 (A. 10-13). Act of June 23, 1874, ch. 455, 18 Stat. 204, 224. An agreement was signed in June 1875 relinquishing the right on condition that an additional $25,000 be appropriated (A. 12-13, 215). Congress never ratified the Act but it did appropriate the additional $25,000 (A. 216). The Sioux, however, continued to hunt in these areas until the 1877 Act (A. 216).

lowed to go there, and they receive a full equivalent for all that is rendered.

* * * * *

The Secretary of the Interior, and the Commissioner of Indian Affairs, will explain to them hereafter, about what would be probably a fair equivalent to the white people and to them which should be given in case they should surrender the Black Hills, or the portion in which gold may be found. As I pointed out to you before, there will be trouble in keeping white people from going there for gold, if it should be discovered * * * it is possible that strong efforts might not be made to keep them out.

My interest is in seeing you protected, while I have the power to make treaties with you which shall protect you. After you go back to your homes and have been there a sufficient time to talk pretty generally with your people, if I get such a word from you as to make it seem desirable, I will appoint commissioners to go out to confer with you. * * * If it should come to the purchase of the Black Hills or a portion of that country from you I would try to see you get a full equivalent in value, and that that money be paid out in U. S. bonds and deposited here, so that the interest would be drawn twice a year for your benefit, and expended for your benefit each year as might be agreed upon, and I look upon it as very important to you, and your children, the Indians who come after you, that you encourage all you can, the children attending schools, in speaking English and preparing yourselves for the life of white men.

* * * * *

> In all this matter, and in all my dealings with the Indians, as I have explained frequently, and once or twice today, I am looking more to their interests than to ours; and I am very anxious that the Government of the United States should pay them in a way that will be of most benefit to them, a full equivalent for all that they have given up, and this is the only way I see a chance of their having in the future a fair equivalent for what they surrender.

The Sioux accepted the suggestion of the President that a commission be established to negotiate for the acquisition of the Black Hills. In June 1875, the Allison commission, chaired by Senator Allison, was appointed and met at the reservation with the Sioux (A. 30-33).[14] Some of the Sioux offered to sell the Black Hills for $70 million (to be paid in food and other material assistance) (A. 168-173), while the commission's best offer was $6 million (likewise to be

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[14] The June 18 instructions of the Commissioner of Indian Affairs to the 1875 Black Hills negotiating commission included this instruction (A. 220-221; emphasis added):

> In negotiating with these ignorant and almost helpless people you will keep in mind the fact that you represent them and their interests not less than those of the Government and are commissioned to secure the best interests of both parties, so far as practicable.
>
> * * * * *
>
> You will also assure the Indians that it is not the wish of the Government to take from them any of their property or rights, without returning *a fair equivalent* therefor, and that you have come, representing their Great Father, to fix upon *an equivalent* which shall be *just both to them and to the white people.*

paid in food and material assistance), or alternatively, $400,000 per year in objects beneficial for their civilization for the right to mine, grow livestock and cultivate the soil in the Black Hills, plus $500,000 (paid over 10 years) for the surrender of the Sioux's off-reservation hunting rights (Pet. App. 16a-17a).[15] No agreement was reached (*ibid.*).

In its lengthy report on the negotiations (A. 158-195), the commission essentially concluded that the Sioux were being unreasonable in demanding that the United States undertake extensive policing of the Black Hills while the Sioux themselves violated other conditions of the treaty and continued to expect gratuitous material assistance from the government without making any serious effort to become self-supporting (A. 34-35, 190-191):

> [U]ntil this treaty is abrogated by the authority of the United States, it is the duty of the Government to see that this "solemn promise" [to permit no entries into the Black Hills] is enforced. When we remember that the exterior boundaries of the reservation cover an extent of over twelve hundred miles, we can realize the magnitude of this promise, especially when for nearly four hundred miles the eastern boundary is the Missouri River, and the south and west

[15] This 1875 Black Hills tract appears to be only about half the size of the one ultimately transferred in 1877, but the Indian Claims Commission assigned about 75% of the 1877 tract's value to this 1875 tract. See 33 Ind. Cl. Comm. at 272-273, 287, 303 and 357. All the township, timber and mineral values v ere within the 1875 tract, together with most of the agricultural value and about half the grazing values.

> an open plain, so that roads are not necessary to enable persons to enter upon the reservation. The Black Hills are nearly in the center of the reservation from north to south, and easily accessible from all sides, except, perhaps, the north. The measure of force to be employed by the United States in enforcing this article of the treaty depends upon the good faith of the Sioux Nation with reference to their obligations. The obligations of the treaty are mutual and reciprocal. The Indians at the post have not so acted as to require the utmost vigilance on the part of the United States. They promised to maintain peace and order on the reservation. A failure to keep this promise would entail a heavy expenditure on the part of the Government, yet they have so conducted themselves, while receiving the bounty of the Government, as to make the establishment of expensive military post necessary at all the agencies. At Red Cloud there are four companies of infantry and two of cavalry; at Spotted Tail, three of infantry and one of cavalry; a post at Fort Laramie, contiguous to the reservation; and a small force at each of the other agencies; all made necessary by the conduct of the Indians, and all requiring great expense for their maintenance, except those on the Missouri River, on account of the distance from cheap transportation. Now, they ask that the Government shall use this military force, not only to preserve order and protect property at the agencies, but also that it shall be used against citizens of the United States who choose to violate law and treaty-obligations, and who, in addition, take the risks of conflict with the In-

dians for the shadowy prospect of gold in the Black Hills!

* * * * *

> Before the Sioux Nation is in position to exact so much of the Government, it should relieve the Government of the necessity to force to protect its own agents and property, purchased for the use of the Indians with money voluntarily appropriated from the public Treasury, and should comply with the provision that requires them to move to a designated place upon their reservation. They insist that the value of the Hills shall be estimated at many millions because of the gold easily acquired, but they refuse to become self-supporting by making effort to acquire it.

The commission analyzed the plight of the Sioux in detail and stressed that the Sioux Nation faced two basic problems (i) their failure to achieve self-sufficiency, their need for a plan designed to achieve self-sufficiency and a means of support until that time (A. 177-178, 183-187), and (ii) the impossibility of keeping whites out of the Black Hills (A. 165, 190-191). The commission, drawing on the lessons of successes achieved by the Choctaws and the Creeks, recommended that because an agreement with the Sioux was impossible to attain, legislation very much like the 1877 Act be passed unilaterally by Congress for the benefit of the Sioux. Such legislation would provide incentives for a "comprehensive system of education" of children and instruction in farming of adults so that the Sioux would eventually be-

come self-supporting (A. 183-189). The commission proposed that rations be provided to the Sioux so long as the conditions for education and labor were met (A. 183-189, 193), to be purchased from a fund created by the payment of an "equivalent" for the Black Hills for the benefit of the Sioux (A. 194). Although the commission did not specify how long it would take to achieve self-sufficiency, the commission clearly contemplated that a full generation of children would have to be educated (A. 184-185). The commission recommended that such a plan be submitted to the Sioux "as a finality" on pain of discontinuation of gratuitous rations (*ibid.*). The experiment was "sure to be resisted at first," said the commission, "but will be assented to gladly in time * * *" (A. 192).

7. *The 1876 Agreement And The 1877 Act*

(a) In the aftermath of the Allison commission, Senator Allison reported a bill for the Committee on Indian Affairs that recited that "persons are now going into the Hills in such numbers as to preclude their prosecution under existing laws, or their removal without the use of a large military force," that the Sioux "are not likely to have in the near future [] the necessary means of self-support," that the United States was "under no obligation by treaty to provide subsistence," and that "there is imminent danger of hostilities growing out of the situation." S. 590, 44th Cong., 1st Sess. (1876); 4 Cong. Rec. 1796 (1876). The bill would have authorized a new commission to explain these circumstances to the Sioux

and to state the desire of the United States "to give them a proper equivalent for the use and occupation of the Hills by the whites" and "to make an agreement with them which will provide for their subsistence and support by appropriations from year to year for a period not exceeding ten years" and, in exchange, the Sioux would relinquish the Black Hills (*ibid.*). The bill as the committee and the Senate amended it (*id.* at 1797) further provided that "all appropriations hereafter made" for the subsistence of the Sioux nation "shall be" upon condition that they will agree "to the conditions set forth" and "no money shall be expended for the subsistence of the Sioux nation unless upon said conditions" after July 1, 1877.[16]

Senator Allison explained the committee bill as follows (4 Cong. Rec. 1798 (1876)):

> [I]t is not proposed by this bill to interfere in the slightest degree with our treaty obligations except in so far as the public circumstances compel us to do so. It is impossible for the Government, except at a very large expense, to remove from the Black Hills the people who are going in there now by the thousand. Why? Because of the character of the country and because of the ease with which persons go in there with their teams and wagons. This bill contemplates that, instead of attempting to do that,

[16] The March 15, 1876, bill replaced a similar version introduced by Senator Allison two days earlier bearing the same number. 4 Cong. Rec. 1796 (1876). The earlier bill would have allowed rations appropriations after July 1, 1876, only on the conditions stated.

> we attempt to make a new bargain with these Indians in reference to that country. It is true we say to them in terms by the second section of the bill that if they do not agree to a reasonable bargain we will cease to support them from the Treasury of the United States, which we now do outside of and beyond any treaty stipulation that we have with them. We obligated ourselves under the treaty of 1868 to subsist these Indians for four years. That term expired in 1873. We are under no obligation now to subsist them that I know of by any treaty; but every Senator who has investigated the question knows perfectly well that these Indians cannot become self-supporting where they now are in any reasonable time; and therefore the alternative is presented to Congress either to subsist them or to starve them or to compel them by force of circumstances to raid upon the border settlements and to subsist themselves in that way.
>
> This is the best adjustment that your Committee on Indian Affairs could make in reference to this subject. I agree with the Senator from Texas that if it was practicable it would be better to remove the people who are now in the Black Hills from this reservation. They are there without authority of law, and in violation of law actually. They have no authority there. We solemnly set apart this region of country, including the Black Hills, for these Indians by the treaty of 1868; but people have gone in there, and it is a question of public policy with us whether or not we shall use the whole Army of the United States against our own citizens for the purpose of recovering this country because gold has been discovered there.

After extensive debate (*id.* at 1796-1801, 1829-1830, 2177, 3530-3539),[17] the bill was further amended to eliminate the provision for the conditional termination of subsistence after one year so that it simply established another commission to negotiate with the Sioux "for the cession to the United States" of parts of the reservation and adjacent territory "or otherwise for the preservation of peace." *Id.* at 3539. The Senate passed it in that form on June 3, 1876 (*ibid.*).[18] In the House, S. 590 was reported with an amendment which specifically permitted the proposed commission to negotiate for the acquisition of the Black Hills (*id.* at 3817). S. 590 was recommitted to committee by the House and died in committee (*id.* at 4470, 4520).

[17] During these debates, it was clear that the termination of subsistence appropriations would begin, if at all, on July 1, 1877, and not immediately. Senator Allison stated that the committee "thought that it would be too soon to provide these conditions in an appropriation made for the current year beginning the 1st of July next, and therefore it would be better to postpone the time one year, or at least leave that discretionary." 4 Cong. Rec. 1796 (1876). Senator Bogy reported that the committee on Indian Affairs thought "it was better not to refuse to feed them now and to feed them for this summer, and let the Indians know that unless some arrangement be made with them the feeding will not be continued hereafter." *Ibid.*

[18] On April 18, 1876, the Senate passed a resolution requesting the Secretary of the Interior to provide it with a copy of the report by Professor Jenney on the resources of the Black Hills (see page 16, *supra*). S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876). The final report was transmitted to the Senate on April 21st. *Id.* at 1.

On June 6, the House passed H.R. 3478, the appropriations bill for the Indian Department, which stated that no portion of the subsistence appropriation of $1 million to the Sioux would be available at any time unless and until the Sioux first agreed to abandon all claims to lands outside the reservation. *Id.* at 3498, 3503-3508, 3639. As to all tribes (and not only the Sioux) the House bill provided that "none of said sums shall be paid to said Indians until they cease their hostilities against white people." *Id.* at 3639. The bill contained no proviso requiring the sale of the Black Hills.[19]

On June 20, the Senate modified H.R. 3478 to provide that one-half of the $1 million appropriation for Sioux subsistence for 1876-1877 would be suspended until the Indians agreed to cede the Black Hills and to relinquish all interest in land outside the reservation.[20] *Id.* at 3902. The House refused to ac-

[19] Although the legislative history is silent on the point, the appropriations bill as passed by the House, did not address the Black Hills question evidently because S. 590 was already pending in the House.

[20] Presumably $500,000 would have been authorized for the first six months of the fiscal year and the remaining $500,000 suspended until the statutory conditions were met or Congress modified them. In making this amendment, the Senate Committee on Appropriations felt if the United States "were compelled to grant this large amount of money for their subsistence, they should be required to relinquish this outside territory, a small portion, comparatively, of their reservation. We make this gratuity on the condition of that relinquishment, hoping it will preserve the peace in that country." 4 Cong. Rec. 3902 (1876).

cede to numerous changes in the appropriations bill made by the Senate (*id.* at 4043), and successive conference committees were appointed. *Id.* at 4043, 4057, 4324, 4563, 5463, 5539. By July 1, 1876, however, the *only* issue of disagreement within the conference concerned a proposed abolition of the Indian Bureau and the transfer of its duties to the War Department.[20a] On August 14, 1876, an agreement was reached on that issue and the appropriation bill was enacted (*id.* at 5601).

As passed, the bill was more generous than the Senate version had been. The full amount of the $1 million appropriation was made available for the fiscal year. The prohibition (that applied to all tribes) against assistance to hostile tribes was relaxed to prohibit only assistance to "any band" of a tribe "engaged in hostilities." 19 Stat. 192 (A. 329-330). The act provided that "hereafter there shall be no appropriation made" for the subsistence of the Sioux unless they first relinquished claims to the hunting grounds outside the reservation, ceded the Black Hills within the reservation, and some agreement was

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[20a] The Senate conferees reported on July 1, 1876, that the conference was deadlocked over only one issue. Senator Windom stated (4 Cong. Rec. 4324; emphasis added):

> I will state briefly the ground of the disagreement between the two committees. *It was wholly with reference* to the third section of the bill, which provides for the abolition of the Indian Bureau and for the performance of the duties of that Bureau by the War Department * * *.

reached with them calculated "to enable said Indians to become self-supporting." *Ibid.*[21]

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[21] The Court of Claims states (Pet. App. 19a) that the Act "cut off" rations for the Sioux unless they met the stipulated conditions. The cut off, however, was not immediate and was set for a year later. The full $1 million was appropriated for the period July 1, 1876-June 30, 1877 with no conditions other than no rations should be given to hostile bands. Only appropriations to be made "hereafter" were tied to relinquishment of the Black Hills. This was also the intent expressed concerning the similar language in S. 590 (see note 17, *supra*). In the Senate version of H.R. 3478 the funds suspended were clearly funds from the current appropriation of $1 million. That language said "only one-half of the last named sum shall be available * * * unless" the conditions were met. 4 Cong. Rec. 3902 (1876). This contrasts sharply with the "hereafter there shall be no appropriation made" language used in the final act.

Moreover, although hostile Sioux who refused to disarm themselves were denied rations (except as prisoners), as required by the 1876 Act, non-hostile Sioux and hostiles who surrendered were not denied rations in 1876-1877 (see A. 52-53, 118). In his report dated October 30, 1876 the Commissioner of Indian Affairs stated that although provisions had been in short supply at the agencies due to transportation difficulties and the failure of Congress to pass the annual appropriations bill until August 15, 1876 (although two interim deficiency appropriations were passed in April and July 1876), "[i]mmediately on the passage of the act [on August 15, 1876], advertisements for proposals for beef, flour, and other supplies" were made. Awards had been made by October 30, 1876. 1876 Annual Report of the Commissioner of Indian Affairs iv-vi. The annual reports for 1876 and 1877 of the Indian agents in charge of the various agencies reported no cut off in rations to non-hostile Sioux. To the contrary at least two agents when asked by reservation Sioux concerning the rumors that no further assistance would be rendered by the government, replied that "all Indians known to be friends of the Government will receive kind treatment and

Although the Court of Claims appeared to suggest otherwise (Pet. App. 7a, 19a), the conference committee did not toughen the Sioux provision in response to news of Custer's defeat on June 25, 1876, at the Little Big Horn. The Sioux rider was settled no later than July 1 (see note 20a, *supra*)—before reports of the battle reached Washington. The news of the massacre reached Washington on July 5, 1876 (A. 314), as the Sioux concede. Appendix to Reply Brief of Sioux Nation (in Court of Claims) C-11. Even on July 7, 1876, Congress did not know the accuracy of the report. On July 7, 1876, the Senate

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every consideration, and that only those who have been in open hostility are to be chastised." 1876 Annual Report of the Commissioner of Indian Affairs 23; 1877 Annual Report of the Commissioner of Indian Affairs 52. Similarly, none of the numerous headmen or chiefs whose speeches were transcribed during the lengthy negotiating sessions in September and October 1876 complained that non-hostile Sioux were being denied rations at that time. This omission is significant inasmuch as many of them registered other related complaints (*e.g.*, lack of farm implements, horses, and ammunition) or discussed rations in general (*e.g.*, whether rations should be dispensed by weight). They undoubtedly would have included a call for resumption of rations had rations been totally denied them. See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 29-90 (1876). Moreover, implicit in the suggestion by some Sioux that the rations ought to be increased and the statements that their agents treated them well was recognition that rations continued to be available to nonhostile Sioux (*id.* at 34, 37, 50, 63, 72, 84). (We acknowledge that the Court of Claims in 1942 (A. 234) made a somewhat ambiguous finding that implies there was a suspension of rations as of August 15, 1876, and that our brief below recited this ambiguous finding (Br. 36); but, for the reasons stated, this was not so.)

passed a resolution asking the President to advise it "whether the recent reports of an alleged disaster to our forces under General Custer in that region are true." S. Exec. Doc. No. 81, 44th Cong., 1st Sess. 1 (1876). The final measure was actually more generous than the Senate version had been, so it is difficult to believe that the news of the battle resulted in punitive legislation. The final measure was similar to S. 590. Its purpose was explained well before the massacre by Senator Allison (see pages 24-25, *supra*). There is no suggestion at all in the history of the conferences between the House and the Senate revealing any motive to retaliate against the friendly Sioux bands because of the actions of the hostile Sioux.

(b) On August 24, 1876, the President appointed the commission to negotiate with the Sioux Tribe as provided in the 1876 Act. This commission, chaired by George Manypenny,[22] proceeded to the Sioux country to conduct negotiations with the several bands at the different agencies on the Great Sioux Reservation and submitted to them a proposed agreement conforming to provisions of the Act of Congress. The instructions to the commission, referring to the rider to the appropriations Act, stated that "the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government and upon full evidence of their disposition

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[22] Manypenny authored *Our Indian Wards* (1889), a most sympathetic treatise of the Indians.

to undertake in earnest measures for their own advancement and support." S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 4 (1876). In its meeting with the Sioux the 1876 Commission "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." *Id.* at 6. The commission explained to the Indians the intent, meaning, and effect of the Act of Congress and the proposed agreement, noting that the subsistence provisions of Article X of the treaty of 1868 had long since been fulfilled and had become extinguished, and that there no longer rested upon the government any obligation to appropriate and disburse large sums annually for their subsistence.

The chiefs, head-men, and less than ten percent of the male adult Indians of the tribe at the different agencies assented to and signed the agreement on dates ranging from September 20 to October 27, 1876 (A. 233-234, 335-346). The proceedings at the various agencies were transcribed. See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. (1876). Most of the numerous head-men and chiefs who stated their wishes appeared willing to sell the Black Hills and in general suggested payment in material support and rations.[23]

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[23] For example, White Eyes said (*id.* at 54):

> The Great Father has asked us to give up the Black Hills. He has probably taken into consideration the value of the hills and expects to *give us an equivalent for them. I think that equivalent will be that our children and poor people will be taken care of*; and that we will have such implements as we need to cultivate the ground and such animals as we need to raise stock from. These things that you have promised to our people and the things that I have asked for we understand are not to be for one issue only, or for one time, but we are to have *this help as long as we live, if necessary.*

Charger, a Sioux chief under the Cheyenne River Agency, stated it in this fashion (*id.* at 61-62):

> I understand that the Great Father formerly gave us rations under treaty, now the treaty has run out, and the council refuses to give us rations, and you come again to correct this. Both sides want to make the thing over again, make it new, both Indians and whites. For our part we would like to stop all war with the Indians, not commit any more depredations, and make peace. * * * This country that you wish to buy from us you tell us is of no use to us; that we do not dig the gold out of it at all. That is true, we do not use it; but, at the same time, we wish to have pay for it when we sell it. The Great Father's people take money out of that country; that money ought to go toward buying us provisions and clothing; if you do that, that will be satisfactory to me. There are many things that I see the Indians are not able to do in the whites' way; we want to learn these things.

Chiefs at the Red Cloud and Spotted Tail Agencies were willing to trade the Black Hills in consideration of five more years of food (A. 51).

Article 5 of the agreement provided in part (A. 333):

> In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and

agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves.

Article 5 went on to provide that whenever the able-bodied Indians were located on lands which were suitable for cultivation that they would be expected to work the land and to provide themselves and their families (the aged, sick, and infirm excepted) with such support as they were able (A. 333). As an added incentive to cultivating industrious habits the Commissioner of Indian Affairs was authorized to provide those who labored other necessary articles as are requisite for civilized life. It was further promised that (A. 333-334):

> The Government will aid said Indians as far as possible in finding a market for their surplus productions, and in finding employment, and will purchase such surplus, as far as may be required, for supplying food to those Indians, parties to this agreement, who are unable to sustain themselves; and will also employ Indians, so far as practicable, in the performance of Government work upon their reservation.

Article 6 provided (A. 334):

> Whenever the head of a family shall, in good faith, select an allotment of land upon such reservation and engage in the cultivation thereof, the Government shall, with his aid, erect a comfortable house on such allotment * * *.

In its report to Congress on the agreement, the Manypenny commission eloquently argued that the Sioux had, up to that time, been repeatedly done injustice by the United States and called for several reforms (A. 105-114). In connection with the seizure of ponies and arms of certain Sioux erroneously suspected of being hostile (see page 40, *infra*), for example, the commission insisted that "[t]he least we can do is to repay these friendly Indians honestly for the full value of the property which was taken" (A. 118). It also concluded that the Allison commission had failed because it had "no authority to offer [the Sioux] any sum which would be a just equivalent for their right in the Black Hills * * *" (A. 112). Notwithstanding the commission's extreme sensitivity to the need to right the wrongs done and to pay just equivalent, the commission nowhere stated that it thought the 1876 agreement denied a just equivalent or otherwise constituted still another injustice. To the contrary, the commission concluded (A. 120) that "[w]e are confident that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs [of the past]."

Congress approved the agreement on February 28, 1877, ch. 72, 19 Stat. 254 (A. 331-346).[24] Thereafter, the United States took possession of the Black Hills and, pursuant to the 1877 Act, appropriated over $57 million in material assistance between 1877 and 1951.[25] In 1889, an agreement signed by three-fourths

[24] This was accomplished by an act of Congress, and not by treaty, because the Executive Branch had been deprived of its power to contract by treaty (subject to Senate ratification) by the Act of March 3, 1871, ch. 120, 16 Stat. 566, 25 U.S.C. 71. This followed years of "resentment" by members of the House of Representatives that, although they "had no voice in the development of substantive Indian policy reflected in" Indian treaties, they were nonetheless expected to initiate necessary appropriations to carry them out. *Antoine* v. *Washington*, 420 U.S. 194, 202 (1975).

[25] The record contains an eight volume, 4,385-page General Accounting Report concerning the Black Hills and hunting rights claims (Sioux Exh. 3 in Docket 74). On pages 6-8 of that report the expenditures made to these Sioux by the United States are summarized and show that a total of $109,289,559.39 had been paid up to June 30, 1925. The largest single items listed are the $21,543,519.03 paid pursuant to the 1868 Treaty and the $36,930,367.03 paid pursuant to the 1876 Agreement—1877 Act. The breakdown and supporting data to the $36,930,367.03 is set out in detail on pages 815-1056. To the total expenditures of $36,930,367.03, the Court of Claims added the $3,055,450.53 expended for fiscal years 1875 and 1876 and reached a total amount of $39,993,962.50. (This latter amount is some $8,144.94 more than the sum of the two figures. The reason for this variance is not known.) The Court of Claims further noted that amounts expended between June 30, 1926, and 1935 brought the total to approximately $43,000,000. The expenditures from 1935 to 1951 brought the total to $57,048,106. See *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 n.2 (Ct. Cl. 1956).

In addition, in *Sioux Tribe* v. *United States*, 105 Ct. Cl. 658 (1946), plaintiffs' claim was based upon the transfer of

of the Sioux, provided that the 1876 agreement was "continued in force * * *" (A. 235).[26]

8. *The Sioux War: 1876-1881*

Although the Sioux subject to the 1868 treaty promised to "regard [the Great Sioux] reservation their permanent home, and [to] make no permanent settlement elsewhere" (A. 323, 325), they reserved the right to hunt on certain lands north of the North Platte, and on the Republican Fork of the Smoky Hill river "so long as the buffalo may range thereon in such numbers as to justify the chase" (A. 323-325). Most "friendly" bands moved to the Great Sioux Reservation and settled near the various government agencies, but a few "hostile" bands, notably the bands led by Sitting Bull and Crazy Horse, refused to recognize the treaty, continued to make their permanent home outside the reservation and continued their nomadic, hunting way of life (A. 45-46, 48). These hostile bands—in derogation of the 1868 treaty promise to withdraw all opposition to

Sioux lands under the provisions of the Act of March 2, 1889, ch. 405, 25 Stat. 888, but defendant claimed as part of its allowable offsets more expenditures listed in the General Accounting Report under the 1877 Act. The findings set out a number of the 1876-1877 expenditures shown in the General Accounting report and conclude that these obligations ($34,504,374.50 as applicable therein) were assumed by the United States under the 1877 Act and accordingly could not be offset against the 1889 claim of the Sioux. 105 Ct. Cl. at 703-709, 715-716.

[26] This was part of the agreement ratified by the allotment Act of March 2, 1889, ch. 405, 25 Stat. 888; 26 Stat. 1554.

the construction of railroads, to wagon trains, and to settlers (A. 324)—raided the railroads, military posts, and agencies (A. 7, 15, 37, 39, 42-48, 125-128, 135). They also made war from time to time on certain friendly tribes—the Arickarees, Mandans, Gros Ventres, Assinaboines, Blackfeet, Payans, Crows and other friendly Sioux—who complained bitterly to the United States that it was not protecting them and who threatened to take up hostilities themselves unless they were protected (A. 39-42, 48, 197). See also 4 Cong. Rec. 3506, 4478 (1876).[27]

On November 9, 1875, E. C. Watkins, United States Indian Inspector, reporting on these hostilities, advised the Commissioner of Indian Affairs that such attacks frustrated the attempts of friendly tribes to learn to cultivate the soil and that the government owed it to them to take severe military action against the hostile bands (A. 39, 125-127). The Commissioner and the Secretary of the Interior agreed that such action would be recommended to the Secretary of War unless all such Sioux reported to the agencies on the reservation by January 31, 1876 (A. 41-42, 127-129). Pursuant to an order dated December 6, 1875, the Indian agents sent messengers to advise all Sioux

[27] In 1876 the Commissioner of Indian Affairs estimated that at least 41,000 Sioux lived on the reservation and that 3,000 "hostiles" lived off the reservation (A. 45, 140). See also the 1870 Annual Report of the Commissioner of Indian Affairs 4; 1873 Annual Report of the Commissioner of Indian Affairs 45-46. The reservation Sioux had settled near six agencies—Santee, Crow Creek, Cheyenne River, Standing Rock, Red Cloud and Spotted Tail (A. 220).

outside the reservation of the order (A. 129). This order applied not only to hostile Sioux but also some reservation Sioux who had been granted permission by their agents to leave the reservation to hunt (A. 112-113). Although some of the Sioux advised the agents that, due to winter snows, they were unable to go to the reservation and that they would go there in the spring (A. 113), the Secretary of the Interior was advised that "Sitting Bull * * * refuse[d] to comply" with the order (A. 43, 133, 134). On February 1, 1876, the Secretary of Interior "turned over to the War Department" the Sioux off the reservation "for such action on the part of the Agency as you may deem proper under the circumstances" (A. 43).

Shortly thereafter and continuing through 1881 the Army conducted military operations against those Sioux who persisted in their refusal to return to the reservation (A. 43-49). Although inevitably questions arose concerning whether the campaign was linked to the Black Hills question, the Secretary of the Interior advised Congress that "[n]o part of these operations [was] on or near the Sioux reservation" (A. 47) and that the "discovery of gold [in the Black Hills], and the intrusion of our people thereon, have not caused this war * * *. The object of these military expeditions was in the interest of the peaceful parts of the Sioux Nation," which he estimated at "nine-tenths of the whole," and "not one of these peaceful or treaty Indians has been molested by the military authorities" (A. 47). After a serious setback

at the Battle of the Little Big Horn on June 25, 1876, the Army defeated the hostile bands who retreated to Canada.[28]

During at least part of the Sioux War, control of the agencies was turned over to the Army (A. 52). Tribal members who had participated in hostilities against the United States were permitted to return to the reservation only so long as they surrendered their guns and horses (A. 52-53). It appears that many friendly Sioux were disarmed and dismounted on the suspicion that they had been or might become hostile (A. 117-118). This deprived them of any convenient means of killing small game and was one of the complaints registered by the chiefs at the August-October 1876 negotiating sessions (A. 117-118). See S. Exec. Doc. No. 9, 44th Cong., 2d Sess. 19-90 (1876). Although the dependence on rations of those disarmed may have increased as a result of this war-time measure, there is no evidence that the compelled surrender of weapons was intended to force the Sioux to sell the Black Hills on pain of starvation. The 1942 decision of the Court of Claims found (A. 238) that there was no direct connection between the war and the Black Hills question.

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[28] The major campaigns occurred before 1878. The hostile Sioux retreated into Canada in 1878. In 1881 Sitting Bull surrendered under a promise of amnesty. D. Robinson, *History of the Dakota or Sioux Indians* 447 (1956 ed.).

B. Judicial Proceedings

1. *The 1942 Court of Claims Judgment*

The removal of the Black Hills from the Sioux Reservation has been the subject of litigation since 1923. The claim was first raised in 1923 in the Court of Claims pursuant to a special jurisdictional act.[29] The Court of Claims, after setting forth in exhaustive detail the historical antecedents to the 1877 Act,[30] concluded that Congress had exercised its plenary power of guardianship over Indian tribal property "pursuant to a policy which the Congress deemed to be for the interest of the Indians and just to both parties * * *" (A. 243). Applying the doctrine of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), the court held that no Fifth Amendment taking had occurred. Having found that the Sioux had proved no legal claim for just compensation, the court held that the special jurisdictional act provided no equitable jurisdiction to examine the issue of whether the Sioux had in fact received fair consideration for the Black Hills.[31]

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[29] Act of June 3, 1920, ch. 222, 41 Stat. 738.

[30] *Sioux Tribe of Indians* v. *United States*, 97 Ct. Cl. 613, 616-657 (1942), cert. denied, 318 U.S. 789 (1943). This opinion is reproduced in part in the Appendix (A. 202-256).

[31] "In the absence of a clear grant of authority by Congress, we have no jurisdiction to go behind the acts of Congress and inquire into any moral obligation of the Government or to determine whether what the Congress agreed to pay, and has paid, was adequate compensation for that which the Indians were required to surrender" (*Sioux Tribe of Indians* v. *United States, supra*, 97 Ct. Cl. at 685).

2. *The 1975 Court of Claims Decision*

The Indian Claims Commission Act of 1946, ch. 959, 60 Stat. 1049, 25 U.S.C. 70 *et seq.*, provided the jurisdiction which the Court of Claims had lacked in 1942. It authorized recovery by tribes for payment of inadequate consideration for tribal lands, 25 U.S.C. 70a(3) and (5).[32] A second round of litigation was commenced before the Indian Claims Commission under 25 U.S.C. 70a(3) and (5), on allegations that government acquisition of the Black Hills was for unconscionable consideration and not as a result of fair and honorable dealings.

The Indian Claims Commission ultimately held [33]

[32] 25 U.S.C. 70a provides in part: "The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe * * * (3) claims which would result if the treaties, contracts, and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; * * * (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity * * *."

[33] The Indian Claims Commission initially held that no claim for dishonorable dealings or unconscionable conduct had been proved. 2 Ind. Cl. Comm. 646 (1954). The Court of Claims affirmed. 146 F. Supp. 229 (1956). In 1957, the Sioux moved for a new trial, claiming inadequacy of prior counsel, and requested that the Court of Claims vacate its 1956 judgment of affirmance and remand for reconsideration based on both the existing record and such additional proof as might be offered. In 1958, the Court of Claims granted the motion in part, remanding to the Indian Claims Commission for a determination whether the record should be reopened. See 182 Ct. Cl. 912 (1968). See also *Sioux Tribe* v. *United States*, 500 F.2d 458, 475-477 (Ct. Cl. 1974). It was.

that the 1877 Act was a taking for which the Sioux were entitled to just compensation including simple interest at 5% per annum from the date of taking.[34] On appeal, the Court of Claims held that the Commission's finding of a Fifth Amendment taking was barred by the Court of Claims' 1942 decision as res judicata.[35] Nevertheless, it held (A. 263) that the Sioux were entitled to recover the principal amount of the Commission's award without interest, under the dishonorable dealings provision of the Indian Claims Commission Act, 25 U.S.C. 70a(5).

3. *The Present Proceedings*

In 1978, Congress amended Section 20(b) of the Indian Claims Commission Act of 1946, 25 U.S.C. 70s(b), so as to direct the Court of Claims to review the merits of the 1974 Indian Claims Commission decision without regard to the defense of res judicata or collateral estoppel. Act of March 13, 1978, Pub. L. No. 95-243, 92 Stat. 153.[36] The judgment now presented to this Court results from that review.

[34] *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 362-363 (1974) (A. 264-299).

[35] *United States* v. *Sioux Nation*, 518 F.2d 1298 (Ct. Cl.), cert. denied, 423 U.S. 1016 (1975) (A. 257-263).

[36] Final judgment was not entered following the 1975 decision of the Court of Claims pending further proceedings before the Indian Claims Commission. The Act of March 13, 1978, then intervened, opening the question whether a taking had been effected necessitating the payment of interest. No payment pursuant to the court's 1975 decision has been made.

The Court of Claims, sitting en banc and examining the same antecedents to the 1877 Act which were before it in 1942, held, over two dissents, that the United States was liable for a Fifth Amendment taking for the removal of the Black Hills from the Great Sioux Reservation (Pet. App. 1a-70a). The court began by observing that "[o]rdinarily, when the United States appropriates property interests of others, that constitutes a taking under the fifth amendment, for which the United States is obligated to pay just compensation" (Pet. App. 9a). The court, however, recognized that a proper exercise of Congress' plenary power to control Indian affairs is not a taking even though it transmutes tribal land into other forms of property (Pet. App. 9a-10a). A proper exercise of this plenary power occurs the court said (*id.* at 10a), quoting *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States*, 182 Ct. Cl. 543 (1968), only where "Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to" another asset. "This," the court observed (*ibid.*), "is a mere substitution of assets or change of form and is a traditional function of a trustee."

In the present case, the court found "no evidence" that Congress had made a good faith effort to give full value. The court deemed it immaterial that the United States spent $43 million or more in fulfillment of its obligation under the 1877 Act. The court noted that a good-faith trustee cannot be faulted if hindsight should demonstrate a lack of precise equivalence (Pet. App. 11a). Conversely, a trustee who does not act in good faith is not redeemed merely because the exchange, in hindsight, turns out to be more than a fair equivalence (*id.* at 11a-12a). Rather, the court held the test is whether the trustee (*i.e.*, Congress) makes—at the time of the exchange—a good faith effort to give the Indians the full value of the land (*id.* at 12a, 28a).

The court stressed two considerations it felt relevant in determining the "good faith" of Congress. First, it held that the inquiry was "an objective inquiry into the nature and purpose of the congressional action, not an attempt to determine the subjective motive of the legislature in taking that action" (Pet. App. 11a). The objective facts are "revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition" (*ibid.*). Second, it placed the burden of justifying its action on Congress and held that where there is "no evidence" that Congress believed the tribe received a fair equivalence, then the statute is a taking and not a valid exercise of the plenary power to manage Indian property (*id.* at 12a-13a n.2).

The court summarized the circumstances leading up to the 1877 Act and found it decisive that at no point did Congress affirmatively state the Sioux received a fair equivalent for the Black Hills (Pet. App.

22a, 24a, 25a, 26a).[37] The court speculated that Congress probably thought the promise to supply rations would end relatively soon and therefore was not expected to be very costly. S. 590 had originally called for further subsistence "from year to year for a period not exceeding ten years * * *" (see page 24, *supra*; Pet. App. 27a). Even though the ten-year limitation was deleted from the final measure the court evidently felt that Congress actually "hoped and anticipated" that the Sioux would be self-sufficient in "a relatively short time." Thus, "[t]here is no reason to believe," the court said, that Congress anticipated that it would be required to supply rations for more than fifty years or that the value of those rations would far exceed the value of the Black Hills (*id.* at 27a-28a). In short, Congress failed to state affirmatively

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[37] For example, the court said:

> There is no indication that Congress believed that, or even considered whether, the obligation it assumed * * * constituted the fair equivalent of the value of the lands * * *. [Pet. App. 26a.]
>
> The terms upon which Congress acquired the Black Hills were not the product of any meaningful negotiation or arm's-length bargaining, and did not reflect or show any considered judgment by Congress that it was paying a fair price. [*Id.* at 25a.]
>
> [There was a] lack of any discussion [in Congress in 1877] of whether the "consideration" * * * was adequate * * *. [*Id.* at 24a.]
>
> [The Manypenny commission's report in 1876] [n]owhere [indicated] that it believed the provisions for rations constituted a fair equivalent * * *. [*Id.* at 22a.]

in its legislative history that it believed a fair equivalent was being returned for the Black Hills. This omission, since the burden of proof was on Congress to establish its good faith, was fatal and dispositive.

The court also determined, contrary to its 1942 holding, that *Lone Wolf* v. *Hitchcock*, *supra*, was not controlling precedent because, in the majority's view, *Lone Wolf* had not reached the question of whether enactment of legislation appropriating Indian lands in return for specified compensation constituted a taking for purposes of the Fifth Amendment (Pet. App. 28a-33a).[38] Having found that a Fifth Amendment taking had occurred, the Court of Claims held that the United States would be liable, not only for the value of the property taken, but also for interest

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[38] Judge Nichols, concurring, joined on this point by Judges Bennett and Kunzig, dissenting, questioned this analysis, reasoning that although the Indian plaintiffs in *Lone Wolf* had stated a claim under the Fifth Amendment, they had sought only declaratory and injunctive relief, rather than just compensation, only because no statute authorized them to sue the United States for just compensation (Pet. App. 40a-44a). See Act of March 3, 1863, ch. 92, 12 Stat. 765, 767; H.R. Rep. No. 1466, 79th Cong., 1st Sess. 2 (1945); Hoyt, *Jurisdiction of the Court of Claims*, 115 Ct. Cl. xxi, xxvii (1950). While the Sioux and certain other tribes were at times allowed to sue by virtue of special legislation granting jurisdiction over particular claims, it was not until more than 40 years after the decision in *Lone Wolf* that Congress enacted legislation providing more generally for recovery on Indian claims. See Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.*; 28 U.S.C. 1505, as added by Section 89(a) of the Act of May 24, 1949, ch. 139, 63 Stat. 102.

from the date of taking, February 28, 1877 (Pet. App. 2a, 33a, 39a).[39]

A final judgment in the amount of $17,553,484, plus interest at 5% per annum on the sum of $17,103,484 of said amount, was accordingly entered (Pet. App. 73a). The United States now challenges only the award of interest on the ground that no taking occurred.

SUMMARY OF ARGUMENT

The Court long recognized that the Indian tribes have been incapable of prudent management of their communal property, and that the United States must undertake this duty as fee owner of tribal lands and pursuant to its power to deal with Indian affairs. A disposal of tribal property in the discharge of this responsibility to manage the property for the tribe's benefit is an act on behalf of the tribe and, in effect, a disposal by the tribe. A proper exercise of this power is no more a taking than would be a sale by the

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[39] Although the Black Hills portion of the reservation was valued at approximately $17.1 million and at least $43 million had been expended to provide the promised rations (Pet. App. 2a, 13a), Congress specifically provided in 1974 that no offset could be claimed for these expenditures. Indian Claims Commission Act of 1946, Section 2, 25 U.S.C. 70a, as amended by the Act of October 27, 1974, Pub. L. No. 93-494, 88 Stat. 1499. The Court of Claims held, contrary to respondents' contentions, that the 1974 amendatory legislation did not bar judicial consideration of these federal expenditures for purposes of making the threshold determination of whether the Sioux were entitled to recover for a Fifth Amendment taking (Pet. App. 14a-15a n.4).

tribe itself, were it freed from historical disabilities. The Court of Claims was in error in declining to so treat the Act of 1877 by which the Black Hills were severed from the Great Sioux Reservation.

I.

First, the decision below wrongly required of the Congress an affirmative declaration that the undertaking assumed in consideration of the cession of the Black Hills constituted a fair economic equivalent. This reverses the usual presumption: the burden is not on those defending legislation to demonstrate that the power invoked was permissibly exercised. On the contrary, the challenger must show that there was no reasonable basis on which Congress could have concluded that the legislation would benefit the tribe. That is the teaching of *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), among other precedents.

Here the 1877 Act recited that "in consideration" of the cession of the Black Hills, the United States undertook a number of commitments, including a guarantee of subsistence until the Sioux could support themselves, the grant of 900,000 acres of grazing land, and a plan calculated to lead the Sioux to eventual economic independence (A. 333-334). Although the Act did not say in so many words that the "consideration" was a "fair consideration," that is presumed. At all events, there is ample affirmative evidence that Congress and its various commissions were sensitive to the need to provide a fair economic equivalent. Certainly, there is no basis for con-

cluding that Congress believed the consideration was inadequate.

II.

Moreover, the Court of Claims erred in confining its focus to the issue of economic equivalence. Although that issue is a factor in the final equation, the welfare of the tribe comprehends more than simply strict maintenance of the net worth of tribal property. In 1874-1877 the Sioux Nation was in extremis. It had no viable means of support. The United States was under no obligation to continue providing gratuitous aid. In these urgent circumstances it was only natural for the United States, as guardian for the Sioux, to sell some of its vast land to secure a guaranteed means of support and a plan calculated to lead the Sioux to self-sufficiency. The sale of the Black Hills also solved another crisis facing the Sioux: despite strenuous efforts until November 1875 to prevent their intrusion, miners poured into the area in search of gold, thus destroying the Sioux's quiet enjoyment of the Black Hills. In these circumstances, it was entirely reasonable for the United States, in the interest of the tribe, to solve both crises facing the Sioux by exchanging the Black Hills for the vital undertakings provided by the 1877 Act. In these circumstances, and in light of the fact that the consideration exchanged was of substantial and obviously not disproportionate value to the Black Hills, Congress acted prudently in not postponing relief until more precise appraisals than already existed could be made.

ARGUMENT

There is much common ground among the parties and the Court of Claims. All agree that—quite apart from the sovereign prerogative of eminent domain—Congress has plenary power to manage and to dispose of tribal land when it is acting to promote the welfare of the tribe (Pet. App. 9a-10a).[40] All agree that in exercising that power Cogress may unilaterally abrogate a prior Indian treaty with superseding legislation (*id.* at 29a-30a, 32a).[41] And all agree that, in some circumstances, governmental appropriation of tribal property can amount to a "taking" within the Fifth Amendment, giving rise to a claim for just compensation, including interest (*ibid.*).[42] What is at issue is what those circumstances are.

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[40] See, *e.g.*, *Roff* v. *Burney*, 168 U.S. 218 (1897); *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 306 (1902); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 565 (1903); *Sizemore* v. *Brady*, 235 U.S. 441, 449 (1914); *Nadeau* v. *Union Pacific R.R.*, 253 U.S. 442, 443-446 (1920); *Morrison* v. *Work*, 266 U.S. 481, 485 (1925). Likewise, Congress has plenary power over the use and distribution of tribal proceeds from the sale of lands and other tribal assets. *United States* v. *Kagama*, 118 U.S. 375, 379-380 (1886); *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977) (and cases cited therein).

[41] "A treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 621 (1871).

[42] *E.g.*, *United States* v. *Klamath Indians*, 304 U.S. 119, 123-125 (1938).

The court below held that whenever Congress deprives an Indian tribe of its land without affirmatively indicating that the exchanged assets are of equivalent value, a Fifth Amendment "taking" has occurred —irrespective of whether the transaction otherwise serves the interests of the tribe. We believe this approach is erroneous because (i) it reverses the usual presumption that Congress is permissibly exercising the constitutional power invoked, and (ii) it too narrowly defines the power of Congress to manage tribal affairs. In our view, the true rule is that Congress must be assumed to be acting within its plenary power to manage tribal assets if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe.

I. An Exercise Of Congress' Plenary Power To Manage And To Dispose Of Tribal Lands Is Presumptively Valid And Must Be Sustained So Long As It May Reasonably Be Deemed Beneficial To The Welfare Of The Tribe

The basic error of the Court of Claims, in our view, was in reversing the usual presumption and requiring the United States to assume the burden of demonstrating that the 1877 Act does not overstep the bounds of congressional power over Indian affairs. The correct approach, we submit, when an exercise of Congress' plenary power to manage and to dispose of tribal property is challenged, is to sustain the legislation so long as it may reasonably be deemed beneficial to the welfare of the tribe. A number of considerations compel this standard of judicial review.

A. As early as 1890, the Court recognized that when tribal lands are taken by the United States pursuant to its power of eminent domain, just compensation must be paid. *Cherokee Nation* v. *Kansas Ry.*, 135 U.S. 641, 657, 659 (1890).[43] The Court, however, has consistently sustained every purported exercise of the power to control tribal property which could reasonably be said to benefit the tribe against tribal challenges that they were takings of property under the Fifth Amendment. Conversely, the only appropriations of Indian land held by this Court to be takings have been those in which, indulging all reasonable doubts in its favor, Congress could not be supposed to have been attempting to benefit the tribe.

In two leading cases the Court held that legislation disposing of tribal property for the benefit of the tribe (but over its objection) did not constitute a taking under the Fifth Amendment. *Cherokee Nation* v. *Hitchcock*, 187 U.S. 294, 307 (1902);[44] *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 564, 567-568 (1903). For

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[43] Even before 1890, the obligation to pay just compensation to tribes for the taking of tribal property by eminent domain was recognized in certain treaties. See, *e.g.*, Treaty of June 5, 1854, Miamis, Art. 10, 10 Stat. 1093, 1097.

[44] In *Cherokee Nation*, Congress authorized the Secretary of the Interior to sell the rights to extract oil from tribal lands and to use the proceeds to the benefit of the tribe. After holding that this was a valid exercise of the plenary power, the Court stated "[t]here is no question involved in this case as to the taking of property" because the legislation "has relation merely to the control and development of the tribal property." 187 U.S. at 307-308.

example, in *Lone Wolf*, as here, Congress passed legislation that disposed of tribal lands without complying with a treaty provision requiring consent of three-fourths of all adult male Indians on the reservation. The tribe filed a bill in equity to enjoin the disposal on the ground that the "interest of the Indians in the common lands fell within the protection of the Fifth Amendment to the Constitution." *Id.* at 564. Although recognizing the tribal right of occupancy to be as "sacred as the fee," the Court rejected the challenge because "Congress possess[es] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests." *Id.* at 564, 565.[45] A purported exercise by Con-

[45] The majority of the Court of Claims concluded that *Lone Wolf* neither reached nor decided the issue of whether the act in question would constitute a Fifth Amendment taking for which just compensation was due (Pet. App. 30a). Stressing that the Indians in *Lone Wolf*, lacking a legal remedy due to the government's sovereign immunity, had sued in equity for injunctive relief, the court reasoned (*id.* at 30a-31a) that this Court decided only the unavailability of equitable relief. This, as Judge Nichols explained below in his concurrence (Pet. App. 39a-45a), misreads *Lone Wolf*. As the Court of Claims itself pointed out, the Indians in *Lone Wolf* "were arguing that the Court should prevent actions which, [they] believed, would result in an unconstitutional taking *if* not promptly enjoined" (Pet. App. 31a n.6) (emphasis in original). Since the Indians then had no remedy at law to obtain just compensation, this Court in *Lone Wolf* necessarily had to conclude that the challenged statute would work no unconstitutional taking, else an injunction would have issued. See *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113-114 (1919), where this Court not only cited *Lone Wolf* to sustain the capacity of the Indians to sue to enjoin disposal of lands

gress of its plenary power to manage tribal assets for the benefit of the tribe, the Court held, is "presumed" to be properly exercised for the welfare of the dependent tribe. *Id.* at 566. "We must presume," said the Court, "that Congress acted in perfect good faith in [its] dealings with the Indians [and] that the legislative branch of the government exercised its best judgment in the premises." *Id.* at 568.[46]

This is not to say that the presumption will not yield to overwhelming evidence that Congress was not acting as a bona fide guardian. But, in all of the

allegedly theirs as public lands of the United States, but directed that disposal be enjoined pending trial and decision on the merits. As Judge Nichols stated (Pet. App. 43a), "*Lone Wolf* is purely and simply a holding that the fifth amendment does not require just compensation to the Indians in the situation then before the Court." This was the basis of the Court of Claims' 1942 decision of this very claim (A. 245-247), and unquestioned by that court until the decision below. See *Three Tribes of Fort Berthold* v. *United States*, 390 F.2d 686, 691 (Ct. Cl. 1968).

The Indian plaintiffs in *Lone Wolf* subsequently brought suit under the Indian Claims Commission Act of 1946, in which the Commission found a fair market value much greater than the compensation allowed under the challenged statute. The Commission allowed a recovery for the net deficiency, without interest. See *Kiowa, Comanche and Apache Tribes* v. *United States*, 4 Ind. Cl. Comm. 95 (1955), aff'd, 163 F. Supp. 603 (Ct. Cl. 1958), cert. denied, 359 U.S. 934 (1959).

[46] In *Lone Wolf*, the Court stated that the management and disposal of tribal lands was a political question not subject to judicial review at all. 187 U.S. at 565. That strict rule has been relaxed in recent years to allow review under the Fifth Amendment rational-basis test. See *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977).

later decisions of this Court awarding just compensation (including interest from the date of the taking), or granting injunctive relief, there could be no colorable claim that the action taken was intended to promote the welfare of the tribe. Indeed, the only such cases involved situations in which the government either treated Indian lands as public lands and sought to sell them as such, *Lane* v. *Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919) (injunction); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351 (1926) (compensation);[47] *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 125 (1938) (compensation),[48] accidently included tribal lands in patents to settlers, railroads and others, *United States* v. *Creek Nation*, 295 U.S. 103, 109-110 (1935) (compensation), diluted the value of the tribal right

[47] The opinion of the Court in *Yankton Sioux* is silent with respect to interest, but the decision and judgment on remand included interest from the date of the taking. 65 Ct. Cl. 427, 431 (1928).

[48] The Court of Claims observed (Pet. App. 32a n.7) that in *Klamath & Moadoc Tribes* the United States paid $108,750 for the land taken "in related parts of a single transaction." This is not really so. In 1864 the United States gave Oregon certain odd-numbered sections on each side of a proposed road without realizing that certain parcels were lands purportedly allotted to tribal members by a treaty made shortly thereafter. The United States sued to recover the allotted lands but lost. *United States* v. *California & Oregon Land Co.*, 148 U.S. 31 (1893), additional opinion on further proceedings, 192 U.S. 355 (1904). In 1906, Congress authorized the Secretary of the Interior to exchange unallotted lands in the reservation (belonging to the tribe) for the allotted lands earlier conveyed to Oregon. The Secretary later made an agreement with the

of exclusive occupancy by moving other tribes onto the reservation, *Shoshone Tribe* v. *United States*, 299 U.S. 476, 496 (1937) (compensation), or simply established a national forest in tribal lands without any compensation, *Chippewa Indians* v. *United States*, 305 U.S. 479, 481-482 (1939). In each instance, it was clear that under no rational theory could the action be viewed as anything other than "an act of confiscation." *Lane* v. *Pueblo of Santa Rosa*, *supra*, 249 U.S. at 113.

B. Although the Court has not had an occasion since *Lone Wolf* to consider the appropriate standard of review of congressional decisions to sell Indian lands, the Court's pronouncements in related areas

owner of the allotted lands pursuant to which the allotted lands were reconveyed to the United States (to be reconveyed to the individual tribal members to whom they had ostensibly been allotted) in exchange for 87,000 acres of unallotted lands on the reservation (which had belonged to the tribe). "That transfer [of 87,000 acres] was made without the knowledge or consent of [the tribe] and without giving them any compensation for the lands so taken from their reservation." *Klamath Indians* v. *United States*, 296 U.S. 244, 248 (1935). Two years later, Congress appropriated $108,750 for the tribe on condition that the tribe execute a release for the taking of the 87,000 acres, and in 1909 the release was provided. When the tribe later sued for just compensation, the release was held a valid bar to recovery. *Id.* at 255. Congress then authorized recovery without regard to the release. *United States* v. *Klamath & Moadoc Tribes*, 304 U.S. 119, 125 (1938). Thus, when the 87,000 acres was taken from the tribe, no undertaking was provided to pay any sum of compensation. And, more importantly, the obvious purpose of the transaction was to benefit the individual owners of the allotments and not the tribe. Thus, there was no purported attempt to manage the tribal land for the better welfare of the tribe.

confirm that the appropriate standard of review is the rational-basis test. Reviewing these decisions in *Delaware Tribal Business Committee* v. *Weeks*, 430 U.S. 73, 84-85 (1977), the Court observed that "[t]he general rule emerging from our decisions ordinarily requires the judiciary to defer to congressional determination of what is the best or most efficient use for which tribal [assets] should be employed." The appropriate "standard of review" is that "the legislative judgment should not be disturbed" so long as " 'the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians * * *'," *id.* at 85, quoting *Morton* v. *Mancari*, 417 U.S. 535, 555 (1974). This is the same rule announced some sixty years before in *Perrin* v. *United States*, 232 U.S. 478, 486 (1914):

> As the power is incident only to the presence of the Indians and their status as wards of the Government, it must be conceded that [the plenary power] does not go beyond what is reasonably essential to their protection, and that, to be effective, its exercise must not be purely arbitrary, but founded upon some reasonable basis. * * * On the other hand, it must also be conceded that, in determining what is reasonably essential to the protection of the Indians, Congress is invested with a wide discretion, and its action, unless purely arbitrary, must be accepted and given full effect by the courts.

Accord: *United States* v. *Kagama*, 118 U.S. 375 (1886); *Wallace* v. *Adams*, 204 U.S. 415, 423 (1907); *Gritts* v. *Fisher*, 224 U.S. 640, 642-643 (1912).[49]

Although these decisions involved Fifth Amendment challenges to statutes based on parallel aspects of Congress' plenary power over tribal property (such as devising schemes for distribution to tribal members of tribal assets), there is no principled basis for disregarding them in our very analogous context, and respondents so concede.[50]

C. In considering the applicable standard of judicial review here, it is important to distinguish those situations in which Congress has expressly created a statutory right of recovery (without interest) based on traditional equitable principles for mismanagement of tribal assets. Just as Congress authorized the Indian Claims Commission to award equitable recovery (without interest) for cessions of tribal land for which inadequate consideration was given (see page 42, *supra*), Congress for many years prior to the Indian Claims Commission Act enacted

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[49] This standard of review is, moreover, consistent with the traditional, rational-basis standard of review applied to determine the validity, against due process challenges, of legislation enacted for the general social welfare of the public. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 491 (1955).

[50] Significantly, even respondents agree (Br. in Opp. 8-9 n.6) that the appropriate standard of judicial review in our case is, as *Weeks* and *Mancari* prescribe, whether it can be " 'tied rationally to the fulfillment of Congress' unique obligation toward the Indians * * *'," citing *Mancari* (417 U.S. at 555).

special jurisdictional statutes authorizing equitable recovery against the United States for losses suffered by the tribes due to action by the United States. In such cases, the Court has often applied a more exacting standard of review.

For example, in *Seminole Nation* v. *United States*, 316 U.S. 286, 295 (1942), the jurisdictional statute authorized the Court of Claims to adjudicate "all legal and equitable claims" arising under treaty or statute. Accordingly, the Court applied "a well established principle of equity" to hold that, by paying money to a fiduciary of the tribe (the Seminole General Council) for the purported benefit of the tribe, with knowledge that the fiduciary intended to misappropriate it, the United States was "a participant in the breach of trust and liable therefor to the beneficiary." *Id.* at 296. The Court deemed it appropriate to apply "the most exacting fiduciary standards" (*id.* at 297) because of the obligation of trust incumbent upon the government in dealing with Indians and, as mentioned, because the jurisdictional statute permitted application of traditional equitable principles.[51] Similarly, in *United States* v. *Mason*, 412 U.S. 391 (1973), an Indian allotment act had specifically provided that the proceeds from the sale of land would be held "in trust" by the United States for the benefit of individual tribal members. A tribal member sued

[51] In *Seminole Nation*, the Court relied upon general state law applicable to fiduciaries and the *Restatement of the Law of Trusts* (1935). 316 U.S. at 296-297 & n.12.

the United States under 28 U.S.C. 1491 for breach of "its fiduciary duty" in making allegedly unnecessary state tax payments from the fund. The court noted that "the scope of the United States' fiduciary duty in administering * * * trust property is a question of federal [common] law." 412 U.S. at 397 n.9, citing *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943).

Significantly, these cases of equitable recovery and many like examples [52] do not purport to find "takings" under the Fifth Amendment and they do not purport to award "just compensation" or interest as a component thereof.[53] The stricter standard of review

[52] *Menominee Tribe* v. *United States*, 101 Ct. Cl. 10 (1944); *Kiowa, Comanche and Apache Tribes* v. *United States*, 4 Ind. Cl. Comm. 95 (1955), aff'd, 163 F. Supp. 603 (Ct. Cl. 1958), cert. denied, 359 U.S. 934 (1959); *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309 (Ct. Cl. 1975) cert. denied, 425 U.S. 911 (1976). See generally *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 282-285 (1955); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903).

[53] In some instances, the challenged action would appear to have been improper under any standard of review. For example, in *United States* v. *Mille Lac Chippewas*, 229 U.S. 498 (1913), Congress did not even purport to dispose of the tribal land pursuant to its plenary power. The Secretary of Interior had simply sold tribal land to the public under the general land laws. Unlike *Lone Wolf* and *Cherokee Nation*, in *Mille Lac Chippewas*, the sale was "not adopted in the exercise of the administrative power of Congress over the property and affairs of dependent Indian wards" but was an assertion of an "unqualified power of disposal over the lands as the absolute property of the Government." 229 U.S. at 510. Sovereign immunity had been waived by a special jurisdictional act con-

applied there is not, therefore, applicable where the issue is—not recovery of damages alone under a common law or statutory right of action—but a claim for just compensation, including interest, based on the Constitution.[54]

To be sure, the present case arises under special legislation which, exceptionally, forbids any deduction for gratuitous offsets, and therefore permits an award of some $17.5 million. But Congress did not purport to enact special rules to control the interest question. As to that, the 1978 Act (Pet. App. 4a) simply instructed the Court of Claims to determine whether the legislation of a century earlier had "effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amend-

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ferring jurisdiction in the Court of Claims to hear and determine the claim. Act of February 15, 1909, ch. 126, 35 Stat. 619. The court's decision appears to rest on equitable grounds but is also fully consistent with its later decisions holding treatment of Indian lands as public lands "confiscation."

[54] The extent to which trust law applicable to private trustees may be imported into the relationship between the United States and Indian tribes where equitable actions for recovery of damages (without interest) are authorized against the United States, as for example, where the United States is by statute required to hold Indian funds in interest-bearing trust accounts, is unsettled. Compare *Gila River Pima-Maricopa Indian Community* v. *United States*, 140 F. Supp. 776, 780-781 (Ct. Cl. 1956) (trust relationship must be defined by a treaty, agreement, regulation, statute or order), with *Manchester Band of Pomo Indians, Inc.* v. *United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (holding applicable the common law duty to make trust productive and the prudent-man rule to United States as trustee under statute). See Note, *Indian Tribal Trust Funds*, 27 Hastings L.J. 519 (1975).

ment." For that purpose, then, the usual standard of judicial review controls.

D. The correct result in the present case is not in doubt if we indulge the applicable presumption of good faith due the Congress of 1877 and ask ourselves whether there is a rational basis for viewing its action as intended to benefit the tribe. In a moment, we shall consider the other, wholly proper, considerations that apparently informed the congressional decision. But even if we look only to monetary equivalence, there is no cause for impugning the Act of 1877.

It is true that Congress made no explicit finding that the undertakings given—in respect of rations and other material assistance—were of equal value to the Black Hills. Yet, the 1877 Act expressly recites that the obligations were assumed "in consideration" of the ceded lands (A. 333). In the absence of compelling evidence to the contrary, we must assume Congress deemed the undertaking a *fair* consideration—as, indeed, experience demonstrated. Bad faith cannot be imputed to the legislators merely because they failed to say, in so many words, that they believed they were paying a fair equivalent.

A reviewing court might well stop here. But if it delved further, the evidence corroborates the congressional intent to act in the interest of the tribe. Although no dollar figures were given as to the value of the considerations exchanged, the record does demonstrate that the United States was sensitive to the

need to give the Sioux a just equivalent for the Black Hills.

In 1875 President Grant directed a survey of the Black Hills "[i]n order to provide for the question of a fair equivalent" (A. 27, 151). While the Jenney report did not place a value on the Black Hills, it did describe the area in detail and the report was supplied to Congress in 1876 at its request. S. Exec. Doc. No. 51, 44th Cong., 1st Sess. (1876). In 1875, the President stated personally to a delegation of Sioux chiefs that he regarded it as "very important" that the Sioux "receive a full equivalent" for the Black Hills (A. 213-215). In 1875 the Commissioner of Indian Affairs called for legislation much like the 1877 Act to solve the Black Hills controversy "offering a fair and full equivalent for the [Black Hills]" (A. 29-30, 151). After unsuccessfully negotiating for a sale to the United States of the Black Hills in 1875, Senator Allison in 1876 called for legislation that would "give [the Sioux] a proper equivalent for the use and occupation of the Hills by the whites" (see page 24, *supra*). Pursuant to the 1876 Act, the Manypenny commission obtained the agreement of head-men and chiefs who spoke at the numerous negotiating sessions held in September-October 1876. In a report quite solicitous of the Sioux, the commission recommended numerous measures to correct past injustices to the Sioux, including the payment of "full value" for property (horses and arms) that had been wrongfully taken from certain tribal members during the Sioux War (A. 118). There was no suggestion

that the commission felt the 1876 agreement was unfair. To the contrary, the commission expressed confidence (A. 120):

> that this agreement contains provisions which, if faithfully carried out, will save these Indians and redress some of the wrongs which furnish the darkest page of our history.

These statements demonstrate that Congress did not ignore the issue of fair economic equivalence.

Finally, the ultimate economic value to the Sioux of the provisions supplied under the Act was $43 million or more, not to mention the value of the 900,000 acres of grazing land added to the reservation. The Black Hills area was eventually found to be worth only $17.1 million. Although the Court of Claims dismissed this one-sided exchange with the observation that "[t]here is no reason to believe that Congress anticipated" that it would be required to purchase rations in such amounts (Pet. App. 27a), the converse would seem to be a more compelling proposition. The actual expenditures under the Act are at least some proof of what was probably expected at the time of the undertaking.

The Court of Claims suggested (Pet. App. 27a) that Congress really believed the commitment would expire in less than ten years because Senator Allison's bill, S. 590—which was not enacted—would have provided rations for no more than ten years in exchange for the Black Hills. Evidently, the court felt that by projecting an annual subsistence appropriation of $1 million annually over ten years, the eco-

nomic benefit to one tribe would have been $10 million, less than the value of $17.1 million eventually attributed to the Black Hills.

There are two serious errors in this suggestion. Even on its face, the outright sale of the Black Hills for $10 million in rations would not have been unreasonable in light of the fact that the Black Hills were incapable of accurate appraisal (due to the impracticality of estimating the quantity of gold in the Black Hills). Furthermore, the deletion of the ten-year limitation from the final enactment, rather than demonstrating an assumption that the Sioux would be self-sufficient within a decade, suggests that Congress believed the Sioux would require more than a decade to achieve economic independence. And, the Allison commission, which originally proposed legislation such as the 1877 Act, contemplated a long-term commitment of education, labor, and assistance (see pages 22-23, *supra*).[55]

In sum, the evidence of record supports the conclusion that the Congress of 1877 meant to give fair value for the Black Hills. Certainly, when we accord

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[55] In his annual report for 1875, the Commissioner of Indian Affairs stated that subsistence appropriations at the rate of $1.1 million would be necessary "for some years to come" (A. 230). The Allison commission predicted that rations would have to be provided for 50 years or more unless its proposal for education, labor and aid was adopted (A. 183). Senator Allison, moreover, stated in introducing S. 590 that "every Senator who has investigated the question knows perfectly well that these Indians cannot become self-supporting where they now are in any reasonable time" (4 Cong. Rec. 1798 (1876)).

to the legislation the presumption of good faith which is due, it is not possible to say that Congress was knowingly cheating the Sioux. It follows that, even if we confine the focus to the question of monetary equivalence, the Act of 1877 must be viewed as a reasonable exercise of the federal power to manage tribal property, and not a "taking" without just compensation.

II. Management Of Tribal Property For The Promotion Of The Welfare Of The Tribe Requires Consideration Of Aspects Of Indian Welfare Other Than Simply The Conservation Of The Net Value Of Tribal Property

We believe the decision below fails on its terms—looking only to immediate monetary equivalence—if we give to congressional action the benefit of the usual presumptions. But, in any event, we submit the Court of Claims wrongly confined its focus to the question whether the undertakings substituted for the Black Hills amounted to an economic equivalent—without considering whether other circumstances in 1875-1877 might have warranted the conclusion that the welfare of the Sioux was promoted by the 1877 Act. As we suggest in due course (see pages 71-75, *infra*), a different result would have been compelled if the court had taken into account—as we believe it was required to do—the failure of the Sioux to achieve self-sufficiency, their lack of any food supply, and the threat to peace and tribal property posed by the discovery of gold in the Black Hills.

A. From the earliest days, this Court has repeatedly recognized that the Indian tribes were incapable

of prudent management of their communal property and that the United States, as the fee owner of the land, necessarily must undertake this responsibility on behalf of the tribe.[56] Whatever revision of that doctrine may be appropriate in the somewhat changed circumstances prevailing today, it reflected the real situation a century ago when the transaction in suit occurred. As the Court explained in *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943):

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic.

Thus, "as regards tribal property subject to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition as it deems necessary to promote their welfare." *Morrison* v. *Work*, 266 U.S. 481, 485

[56] The trust concept of the United States as guardian and the Indian tribes as wards has an ancient lineage that dates from the earliest treaties with Indian tribes in which the United States received the Indians "into their protection." *E.g.*, Treaty of October 22, 1784, 7 Stat. 15; see F. Cohen, *Handbook of Federal Indian Law* 48 (1942) ("Cohen").

(1925). This power to protect the "remnants of a race once powerful, now weak and diminished in numbers" must "exist in that [general] government, because it never has existed anywhere else." *United States* v. *Kagama*, 118 U.S. 375, 384 (1886). F. Cohen, *Handbook of Federal Indian Law* 94-98 (1942).

When Congress acts under its power to manage Indian lands for their protection and welfare, it is, in a very real sense, acting on behalf of the tribe and, in effect, the disposition of property is by the tribe itself. Although the analogy is not exact,[57] the

[57] As Felix Cohen explained, the guardian-ward concept has been used in Indian cases in at least ten different ways. Cohen, *supra*, at 169-173. The relationship of guardian and ward, however, as it is known at common law, "does not exist between the United States and the Indians, although there are important similarities and suggestive parallels between the two relationships." *Id.* at 169.

To take only two examples, although under traditional trust principles a trustee may not represent conflicting interests, the United States has, by necessity, represented both the tribes and the public interest in the various allotment acts authorizing the sale on behalf of the tribe of unalloted tribal lands to the general public. See, *e.g.*, the General Allotment Act, ch. 119, 24 Stat. 388. To be sure, a goal of the allotment acts was to assist individual tribe members by providing them with land allotments for farming and a share of the funds received from the sale of unalloted tribal lands. But another interest was that of the "familiar forces" who sought to "open" the unallotted areas to settlement. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 431 (1975); *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584, 590 (1977). The validity of these acts under the Fifth Amendment is nevertheless beyond question. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). So, also, Congress has on occasion waived the sovereign immunity of a tribe and subjected it to suit under special jurisdictional acts to allow certain claims to be heard against

disposition is analogous to an action by a guardian on behalf of its ward: the transaction is deemed to be made by and for the ward even though the power to effect it resides in the guardian. A valid exercise of the power, therefore, is no more a taking than would be a sale by the tribe itself, freed from the disabilities imposed by history.

Without carrying it to its logical conclusion, the Court of Claims accepted this analysis in part. The court recognized (Pet. App. 11a) that dispositions of Indian land by the national sovereign must be deemed to be made on behalf of the tribe and that no taking occurs "as long as [the United States] fairly (or in good faith) attempts to provide [its] ward with property of equivalent value." The court also agreed that hindsight does not control. Even if it later transpires that the tribe suffered an economic loss, the transaction is not deemed a taking so long

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the tribe. Even though the tribe is also the ward of the United States, such statutes do not violate the trust responsibility of the United States or the Fifth Amendment. *Winton* v. *Amos*, 255 U.S. 373, 392 (1921). Similarly, in the present case, it is obvious that the miners and other settlers who wanted to "open" the Black Hills represented an interest in conflict with the interest of the Sioux. This circumstance, however, does not defeat an otherwise valid exercise of Congress' plenary power to manage Indian lands for their benefit or render it a taking under the Fifth Amendment. Otherwise, given the competing interests Congress may also represent, virtually no disposition by Congress of tribal lands would be valid. Rather, the duty is for Congress to insure that its action on their behalf promotes the welfare of the tribe, even if it also benefits non-Indian interests. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 235 (Ct. Cl. 1956).

as there was, at the time, a good faith attempt to achieve economic equivalence (*ibid.*). But the court declined to go further and recognize that the welfare of the tribe may, on occasion, require consideration of a broad complex of factors beyond economic equivalence.

The rule adopted by the court below would confine the guardianship role of the government to that of a very conservative land manager. Normally, disposition of tribal lands would be forbidden, since their net worth could ordinarily be conserved simply by holding the property intact. Yet, the general welfare of the tribe is the preeminent consideration, not simply the net worth of the tribe. There are times—or, at least, there were a century ago—when the more fundamental interests of a tribe, the need to chart a course calculated to lead to the tribe's self-sufficiency, or even its survival as a community, necessarily eclipsed extended debate about the relative economic values. In such cases, the plenary power of Congress permits it to manage tribal property as "necessary to promote [tribal] welfare," and Congress need not insist on prior proof of precise economic equivalence before responding on behalf of the tribe to meet such emergencies.

B. When we apply these principles to the transaction involving the Black Hills, it is clear that the Congress of 1877 was properly exercising its broad powers as guardian of the Sioux Nation. Viewed in the light of the severe emergency circumstances facing the Sioux in 1874-1877, the 1877 Act is readily

understood as a measure designed to promote the welfare of the Sioux Tribe.

The Sioux had not, contrary to expectations, achieved self-sufficiency. The Sioux on the reservation remained dependent, to a large extent, on provisions supplied by the United States. The duty under the treaty of the United States to supply such provisions (pursuant to which the United States spent over $5 million) had expired on June 30, 1874. From that date until passage of the 1877 Act, the Sioux Nation had no viable means of support. Although the United States gratuitously appropriated over $1.1 million annually from 1874 until the 1877 Act, it did so without any obligation. In these dismal circumstances, it was of the utmost importance to the welfare of the Sioux Nation that it secure not only immediate relief but also a long-term plan calculated to achieve their self-sufficiency. The 1877 Act provided precisely such a plan, not simply by guaranteeing provisions so long as needed, but by conditioning individual benefits on efforts to educate children and to undertake work calculated eventually to instill skills that would lead to economic independence (see pages 22, 23, 34, *supra*).

Even in the absence of the Black Hills controversy, the disposition of tribal land in exchange for such a plan would have been prudent and in the best interests of the Sioux. In the face of the Black Hills problem, the 1877 Act was all the more imperative. The Army's best efforts for eight years had failed to keep whites out of the goldfields in the Black Hills. The

Sioux themselves were incapable of peacefully dissuading the miners who wrongfully invaded the Black Hills in search of gold. Although they might have resorted to hostilities against the miners to preserve the Black Hills, such a course would have taken its own toll in blood on the tribe. And, in the end, it is problematical whether tribal policing efforts against the miners would have been any more successful than the "very stringent," but ultimately futile, efforts of the Army from 1868 to 1875. In the final analysis, Congress recognized that, despite military efforts by the government, the quiet enjoyment of the Black Hills by the Sioux was impossible due to actions beyond the effective control of the United States or the Sioux. Congress was entitled to conclude that both crises facing the Sioux would best be solved and the welfare of the Sioux best promoted by the cession of the Black Hills to the United States in exchange for a long-term commitment to supply food and a plan calculated to lead to economic independence (and 900,000 acres of additional land).

If the promise to supply continuous provisions for as long as needed (plus 900,000 acres of land)[58] had been of obviously disproportionate value to the Sioux, or if the difficulties facing the Sioux had not reached the boiling point, or if other solutions had

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[58] As noted by the court below (Pet. App. 13a n.3), we do not contend that the 900,000 acres of grazing land by itself constituted a "significant element of the consideration," at least as to its value in dollars as compared to the over seven million acres in the Black Hills. But we do contend that its value must be considered.

convincingly presented themselves, Congress might have felt free to give more deliberate consideration to the relative economic values of the considerations exchanged. More surveys and appraisals might have been made of the Black Hills. The projected value to the tribe of the plan established by the 1877 Act to achieve economic independence might have been approximated. But those were not the circumstances. In light of the fact that the crisis demanded an immediate response, it was plain enough that the value of the promise to supply provisions until achievement of self-sufficiency, while of uncertain monetary value, was of enormous practical importance to the survival of the tribe and appeared to be of sufficient duration as to entail a substantial outlay of money over the decades to come. In this situation, it was entirely reasonable to go forward with a solution rather than to remain paralyzed while appraisals of the values of the Black Hills and the governments' undertaking were made.

When all the aspects of the crisis facing the Sioux Nation in 1875-1877 are viewed together, as they appeared at the time, it is plain that Congress rationally could have concluded that the 1877 legislation promoted the welfare of the tribe. Accordingly, the Court of Claims erred in refusing to sustain the 1877 Act as a constitutional exercise of congressional power over Indian affairs.[59]

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[59] It is largely immaterial (a) that only 10% or less of the total tribal members signed the 1876 agreement, or (b) that Congress made known its intention to refuse after July 1, 1877, to make further gratuitous subsistence appropriations for the Sioux in order to induce the Sioux to accept an agreement Congress felt would promote their welfare. These facts would have become relevant had a purported three-fourths agreement been the basis for the cession. It was not, however. Although Congress was entitled to try to secure by consent what it thought best for the tribe, failing that, or even in the absence of such an effort, Congress was fully empowered to exercise its plenary power to control Indian lands and to do so in derogation of the 1868 treaty without obtaining the tribe's agreement (see pages 51-52, *supra*).

CONCLUSION

The judgment of the Court of Claims should be reversed insofar as it holds the United States liable for a Fifth Amendment taking of the Black Hills and the judgment against the United States should be reduced to $17,553,484.

Respectfully submitted.

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UNITED STATES OF AMERICA, *Petitioner,*

v.

SIOUX NATION OF INDIANS, ET AL., *Respondents.*

On Writ Of Certiorari To The United States Court of Claims

BRIEF FOR THE SIOUX NATION

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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-639

United States of America, *Petitioner,*

v.

Sioux Nation of Indians, et al., *Respondents.*

BRIEF FOR THE SIOUX NATION

OPINIONS BELOW

The final opinion of the Court of Claims (Pet. App. 1a-70a) is reported at 601 F.2d 1157 (1979). The opinion of the Indian Claims Commission (A. 264-315), which the court below affirmed, is reported at 33 Ind. Cl. Comm. 151 (1974). An important earlier opinion of the Court of Claims in this litigation (A. 257-63d) is reported at 207 Ct. Cl. 234, 518 F.2d 1298 (1975).

QUESTIONS PRESENTED

1. Whether the United States, under circumstances constituting a legislative taking of private property, need not pay just compensation under the Fifth

Amendment to an Indian tribal owner of treaty-protected land on the same basis as a non-Indian landowner.

2. Whether the Court of Claims, in applying a "good faith effort" test for finding a Fifth Amendment taking in Indian cases, correctly determined that Congress did not make a good faith effort to pay the Sioux for the Black Hills.

3. Whether the United States is excused from its constitutional obligation to pay the Sioux just compensation for a taking of their property if Congress, in the 1877 Act which effected the taking, intended to promote their welfare.

TREATIES AND STATUTES INVOLVED

Articles 2 and 12 of the Treaty of April 29, 1868, 15 Stat. 635, set forth in full at pages 317-28 of the Appendix, provide in material part:

> Art. 2. The United States agrees that the following district of country [Great Sioux Reservation] * * * shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named * * * ; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents, and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians * * *.
>
> Art. 12. No treaty for the cession of any portion or part of the reservation herein described

> which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same * * * .

The Act of August 15, 1876, 19 Stat. 176, from which an excerpt is printed at pages 329-30 of the Appendix, provides in material part:

> For this amount, for subsistance, including the Yankton Sioux and Poncas, and for purposes of their civilization, one million dollars: *Provided,* That none of said sums appropriated for said Sioux Indians shall be paid to any band thereof while said band is engaged in hostilities against the white people; and hereafter there shall be no appropriation made for the subsistence of said Indians, unless they shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the treaty of eighteen hundred and sixty-eight for said Indians; and also so much of their said permanent reservation as lies west of the one hundred and third meridian of longitude, and shall also grant right of way over said reservation to the country thus ceded for wagon or other roads, from convenient and accessible points on the Missouri River, in all not more than three in number * * * .

Article 5 of the Act of February 28, 1877, 19 Stat. 254, set forth in full at pages 331-35 of the Appendix, provides in material part:

> In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians

in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef, (or in lieu thereof, one-half pound of bacon,) one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves. *Rations shall, in all cases, be issued to the head of each separate family; and whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school. Whenever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick and infirm excepted;)* * * *.[1]

The Act of March 13, 1978, 92 Stat. 153 (P.L. 95-243), provides in its entirety:

> [S]ection 20(b) of the Act of August 13, 1946 (c. 959, 60 Stat. 1054), as amended, is hereby further amended by adding a new sentence at the end thereof, as follows: "Notwithstanding any other provision of law, upon application by the claimants within thirty days from the date of the enactment of this sentence, the Court of Claims shall

[1] Petitioner omits the italicized portion of the 1877 Act, showing the limited and conditional nature of the Government's promise, from its reprint of the statutes involved. (Govt. Br. 3.)

> review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly. In conducting such review, the Court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo.

STATEMENT

Petitioner's background statement represents an exercise in revisionist history—and thus is not acceptable to respondents. In brief, petitioner seeks to convert a course of governmental conduct towards the Sioux Nation during the period 1874-1877, which the court below characterized as probably the most "ripe and rank case of dishonorable dealings . . . [to] be found in our history" (A. 261), into the benign action of a concerned trustee. The record precludes such legerdemain.

The statement of the Sioux Nation, which follows, is taken directly from the findings of fact entered by the Indian Claims Commission in 1974 (A. 264-315) and from the 1979 opinion of affirmance by the Court of Claims (Pet. App. 1a-70a), the judgment which is before this Court for review. Petitioner largely ignores these findings of fact and refers in its statement primarily to unevaluated evidentiary materials[2] or to

[2] The Government is asking this Court to retry the background facts, contrary to the principles governing review of Court of

the findings entered in 1942 by the Court of Claims in *Sioux Tribe of Indians* v. *United States,* 97 Ct.Cl. 613 (A. 202-56). The special jurisdictional Act of March 13, 1978 (pp. 4-5, *supra*), however, expressly defines the terms under which this case is to be considered and provides that the Court of Claims shall decide the Sioux' Fifth Amendment claim "on the merits, without regard to the defense of res judicata or collateral estoppel," and, in reaching that decision, shall determine the issue of whether a taking occurred "de novo." Thus, for present purposes, the 1978 Act wiped the judicial slate clean,[3] and the Government's continued reliance upon the 1942 *Sioux* opinion is inappropriate and improper.

A. Historical Setting

1. *The Treaty of April 29, 1868:* Although the critical period in this case is 1874-1877, the events of those years must be viewed in the context of the previous relationship between the Sioux and the Govern-

Claims' judgments laid down in *United States* v. *Penn Foundry and Mfg. Co.,* 337 U.S. 198, 205 (1949); *Seminole Nation* v. *United States,* 316 U.S. 286, 300 (1942); and *Crocker* v. *United States,* 240 U.S. 74, 78 (1916).

[3] In 1975, the court below reversed the Commission's determination that the Act of February 28, 1977, *supra,* effected a taking of the Black Hills country on the ground that its 1942 dismissal of the Sioux claim, whether "rightly or wrongly" decided, was *res judicata* on the issue of a Fifth Amendment taking. (A. 257, 263.) Congress passed the Act of March 13, 1978, *supra,* for the specific purpose of overriding the *res judicata* effect of the 1942 *Sioux* decision and according the respondents a new hearing on the merits of their claim. H. REP. No. 95-529, 95th Cong., 2d Sess. (1978), reprinted in *1978 U.S. Code Congressional and Administrative News,* vol. 3, pp. 433 *et seq.* Petitioner's repeated reliance upon the 1942 opinion thus violates the express mandate of Congress.

ment. As the court below has observed (Pet. App. 5a), the factual background of the Black Hills claim begins with the Treaty of April 29, 1868, *supra,* into which the United States and the Sioux Nation entered after the Powder River War of 1866-1867 and passage of the Indian Peace Commission Act of July 20, 1867, 15 Stat. 17. By virtue of the 1868 Treaty, the United States acquired 48,142,000 acres of Sioux land in the present States of North Dakota, South Dakota, Montana, Wyoming and Nebraska, the bulk of which respondents had held under recognized title[4] pursuant to the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. *See Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 500 F.2d 458 (1974).[5]

Under the 1868 Treaty, the United States made three major promises to the Sioux Nation. (Pet. App. 5a.) First, the United States agreed that the Great Sioux Reservation, consisting of all the present State of

[4] Recognized or treaty title is to be distinguished from unrecognized or original Indian title. (*See* pp. 40-41, *infra.*) In *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1954), while holding that aboriginal title is not protected by the Fifth Amendment, the Court reaffirmed that, "where the Congress by treaty or agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." 348 U.S. at 277-78.

[5] In this separate, but related proceeding, the Indian Claims Commission has since determined that the United States paid the Sioux an unconscionable consideration for their property under the 1868 Treaty (about $45.5 million less than the fair market value)—a judgment on liability and value from which the Government has not appealed. *Sioux Tribe* v. *United States,* 42 Ind. Cl. Comm. 214, 232 (1978). The Sioux 1868 Treaty case currently is pending before the Trial Division of the Court of Claims on remand following the Government's successful appeal from the Commission's disallowance of offsets. *United States* v. *Sioux Tribe,* —— Ct. Cl. —— (Appeal No. 4-78, decided February 20, 1980).

South Dakota west of the Missouri River and including the Black Hills country here before the Court, was "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." (Art. 2.) Second, the United States agreed that no unauthorized persons "shall ever be permitted to pass over, settle upon, or reside in" the Great Sioux Reservation. (*Ibid.*) Last, the United States agreed that no treaty for the cession of any portion of the Great Sioux Reservation "shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians. . . ." (Art. 12.)

As set forth below, in less than ten years the United States had broken each of these three key promises.[6]

2. *Invasion of the Great Sioux Reservation, 1874-1875:* At the time the 1868 Treaty was negotiated, the Sioux and some federal officials knew that gold was present in the Black Hills portion of the Great Sioux Reservation, but the Government had no confirmed

[6] Petitioner alleges that the 1868 Treaty "contemplated that the Sioux would become self-supporting on the reservation" and blames the Sioux for a "failure to achieve self-sufficiency" within four years. (Govt. Br. 7-8.) These statements are not based upon any finding of fact by the court below and are contrary to the record. The Sioux, for example, were self-sufficient before the United States acquired 48 million acres of their homeland under the 1868 Treaty. Moreover, contrary to the Government's thesis, the Sioux did not undertake any treaty commitment to shift from subsistence hunting to a farming economy in four years or any other fixed period of time. Indeed, under Articles 11, 15 and 16 of the 1868 Treaty, the Sioux expressly reserved their hunting rights outside the Great Sioux Reservation and, under Article 10, the United States agreed to pay $10 per person per year for up to 30 years to the Sioux "while such persons roam and hunt." (A. 323-25.)

data that gold existed there in sufficient quantities to be valuable. (Pet. App. 6a; A. 308.) Confirmed knowledge of gold deposits could be expected to invite an invasion of the reservation by miners, since the California gold rush was then recent history. Nevertheless, and without the consent of the Indians, the Secretary of War in May 1874 directed Lt. Colonel George A. Custer to undertake a reconnaissance mission through the Black Hills country, in part to report upon its mineralization. The Custer expedition that summer discovered gold in paying quantities and widely circulated the news in late August 1874. (Pet. App. 6a; A. 309-10.) Soon thereafter, a predictably large number of prospectors, miners and settlers swarmed into the Black Hills, again without the consent of the Sioux, and public demand for acquisition of that territory quickly developed and increased. (*Ibid;* A. 258.)

As required under Article 2 of the 1868 Treaty, federal military forces in the area initially attempted to exclude and remove these unauthorized persons from the Black Hills, but their endeavors, whether because of inability or unwillingness to keep the miners out, were largely unsuccessful. (Pet. App. 6a; A. 311.) Their efforts were also short-lived.[7] Having stimulated

[7] Petitioner claims that the United States made a serious effort to exclude miners from the Black Hills. (Govt. Br. 9-14.) The court below did not so find and the record does not so demonstrate. The facts are that the miners began invading the Black Hills in force during the fall of 1874, that mining operations were largely suspended during the winter, and that the Commissioner of Indian Affairs by early spring of 1875 already was calling for a cession of the Black Hills by the Sioux because of the alleged impossibility of keeping the miners out. Actually, as early as March 16, 1875, and thus long before the difficulty of excluding miners from the Great Sioux Reservation had become evident, the Adjutant-General,

an unlawful invasion of the Great Sioux Reservation by making known its value for gold, the Government promptly responded to the miners' demands by beginning to pressure the Sioux for a land cession. (A. 310.)

In May 1875, the Secretary of the Interior brought a delegation of Sioux chiefs to Washington to hear preliminary proposals concerning the purchase of the Black Hills by the United States and the extinguishment of the off-reservation hunting rights possessed by the Sioux under Articles 11, 15 and 16 of the 1868 Treaty. (A. 311.) On June 3, 1875, President Grant met with the delegation.[8] Concerning the Black Hills, he warned the Sioux that "there will be trouble in keeping white people from going there for gold" and "it is possible that strong efforts might not be made to keep them out." (Pet. App. 16a; A. 311.) The Sioux delegation then was returned home to await arrival of the Government's treaty representatives.

In September 1875, the Allison Commission, appointed by the Secretary of the Interior upon instructions from President Grant to negotiate with the Sioux for the cession of the Black Hills and the surrender of hunting rights, met with the Indians on the

at the request of the President, instructed General Sherman to publicize the fact that "[e]fforts are now being made to arrange for the extinguishment of the Indian title" to the Black Hills country. (A. 79-80.)

[8] About the same time, on instructions from President Grant, Walter P. Jenney, a mining engineer, began conducting a topographical and geological survey of a portion of the Black Hills. (*See* p. 67, n.48, *infra*.) Jenney ultimately reported that this area contained excellent timber, agricultural and grazing lands as well as gold, but he did not attempt even to approximate its worth. (A. 310-11; *see* Govt. Br. 16.)

Great Sioux Reservation in grand council. (Pet. App. 16a; A. 312.) The Commission urged the Sioux to sell the Black Hills

> because 1—they were unable to support themselves and ought to bow to the wishes of the Government which fed them, 2—the Army was unable to keep settlers out of the hills and armed conflict between whites and Indians was inevitable, and 3—gold was useless to the Sioux.

(*Ibid.*) The Sioux spokesmen, realizing the great value of the Black Hills to the United States, offered to sell the gold country for $70 million, plus additional compensation for the gold already mined. The Allison Commission offered $6 million or, alternatively, $400,000 a year for the right to mine, grow livestock and cultivate the soil in the Black Hills, plus $500,000 paid over ten years for the surrender of the Indians' off-reservation hunting rights. (Pet. App. 16a-17a; A. 312.) No agreement was reached.

In describing the 1875 negotiations, petitioner repeatedly asserts that the Grant Administration there sought to offer the Sioux "a fair and full equivalent" for the Black Hills. (Govt. Br. 15-23.) The court below, however, found to the contrary. Looking through the self-serving justifications for their conduct by the federal officials involved, the Court of Claims pointed out:

> In its report on the unratified 1876 agreement that Congress adopted in the 1877 statute, the 1876 Commission stated that the Allison Commission had failed to obtain an agreement "because they had no authority to offer them [the Indians] any sum which would be a just equivalent for their right in the Black Hills, or which gave to the In-

dians hopes for the future." S. EXEC. DOC. No. 9, 44th Cong., 2d Sess. 12 (1876).

(Pet. App. 17a.) Moreover, the Jenney report (p. 10, n.8, *supra*), upon which petitioner heavily relies to show that the Government's representatives understood what a "fair equivalent" might be (Govt. Br. 15-17), actually made no mention of the value of the Black Hills and, moreover, was not even issued until November 1875, or, in other words, after the Sioux negotiations had terminated.

Following the Allison Commission's failure to obtain a cession of the Black Hills, the Grant Administration applied a new form of duress against the Sioux. (Pet. App. 17a.) In November 1875, the President, with the concurrence of the Secretary of War and the Secretary of the Interior, decided that, although the law still prohibited non-Indians from entering the Great Sioux Reservation, the Army would be ordered to cease opposition to their activities and would be removed from the area.[9] (Pet. App. 6a; A. 258, 312.) This major policy change was communicated to the military on a confidential basis (A. 59-60), but was otherwise kept secret to forestall opposition from those members of Congress and interested citizens who supported a peaceful solution to the issue. Of course, the

[9] The Court of Claims stated that "[t]he Government apparently believed that the Sioux's needs for the rations the government had been supplying them would prevent the Indians from making trouble." (Pet. App. 6a-7a.) Petitioner's contention that "there is no evidence" in support of this statement (Govt. Br. 14, n.11) is not well-taken. The court below plainly relied upon the observation of General Sherman, in a letter dated November 20, 1875, to General Sheridan, that "I think the Sioux Indians are all now so dependent on their rations, that they will have to do whatever they are required to do." (A. 60.)

miners noted the evacuation of the troops and, as the Army withdrew, promptly flocked into the Black Hills in ever-increasing numbers. (A. 312.)

3. *Government Use of Food as a Weapon, 1875-1877:* In November 1875, the Grant Administration also began to pressure Congress for unilateral action to acquire the Black Hills. (A. 312.) In his 1875 annual report, Commissioner of Indian Affairs Edward Smith noted that the Sioux were unable to support themselves and were receiving about $1,250,000 in rations annually, which the United States was under no legal obligation to provide. He stated that the failure to receive these rations would reduce the Sioux to a state of starvation and expressed the view that the Government was entitled to ask something of the Sioux in return for food. (A. 312-13.) Unlike petitioner's statement in this case, the Commissioner of Indian Affairs in 1875 candidly conceded that the Sioux were being "compelled to surrender" the Black Hills "for the sake of promoting the mining and agricultural interests of white men. . . ." (A. 152.)

The 1875 annual report of the Secretary of the Interior expressed a similar view. Specifically, the Secretary wrote that for the past two years Congress had been appropriating $1,260,000 for sustenance of the Sioux, that this amount was a gratuity for which the Government received nothing, and that without receipt of rations the Sioux would starve. The Secretary concluded that the Government would be justified in making receipt of further supplies contingent on Sioux relinquishment of the Black Hills gold fields and right-of-ways to the fields through the Great Sioux Reservation. (Pet. App. 17a-18a; A. 313.)

As the Indian Claims Commission expressly found, the Grant Administration, without waiting for action by Congress, precipitated relations with the Sioux into a crisis. (A. 313.) Using as a pretext some raids by a small number of non-reservation Sioux against whites and Indians of other tribes in the "unceded Indian territory" established for respondents pursuant to Article 16 of the 1868 Treaty,[10] the Secretary of the Interior, on December 3, 1875, instructed the Commissioner of Indian Affairs to direct federal officers at all agencies in Dakota and at Fort Peck, Montana to notify the Sioux in the Yellowstone and Powder River areas "that unless they shall remove within the bounds of their reservation (and remain there) before the 31st of January next, they shall be deemed hostile, and treated accordingly by the military force." (A. 313.)

The bulk of the Sioux within the unceded Indian territory during the winter of 1875-1876 were peacefully hunting with the permission of their agents, as they had a right to do under Article 16 of the 1868

[10] Article 16 of the 1868 Treaty provides in material part:

> The United States hereby agrees and stipulates that the country north of the North Platte River and east of the summits of the Big Horn Mountains shall be held and considered to be unceded Indian territory, and also stipulates and agrees that no white person or persons shall be permitted to settle upon or occupy any portion of the same; or without the consent of the Indians first had and obtained, to pass through the same. . . .

The "unceded Indian territory" consisted of about 25 million acres (Govt. Ex. V-1 (map)), lay immediately west and south of the Great Sioux Reservation and contained the best Sioux hunting grounds in the valley of the Powder River. That some Sioux were hostile to unauthorized white persons there is hardly surprising. (*See* A. 109-12.) In addition to a constant stream of illegal emigrants through the Article 16 country, settlers unlawfully occupied a portion of the Sioux hunting territory in Nebraska with the assistance of the General Land Office as early as 1873. (A. 7-9.)

Treaty. (Pet. App. 7a; A. 313.) The severity of the winter made it physically impossible for the Sioux to comply with the Secretary's instructions. Indeed, the weather was so harsh that the Secretary's own messenger could not return to the reservation by the deadline. Nonetheless, on February 1, 1876, the Secretary of the Interior notified the Secretary of War that his order had not been followed and that the Sioux were being turned over to the Army for appropriate military action. (*Ibid*; A. 258.)

In military operations against Indian tribes, the Army generally destroyed the Indians' homes, food supplies and other resources, and the so-called "hostiles"—men, women and children—were to be shot on sight. The Army commenced such a war of attrition against the Sioux in the spring of 1876. The climax of that campaign was the famous defeat of General Custer at the Little Big Horn on June 25, 1876. (Pet. App. 7a; A. 314.)

Congress responded by approving a rider to the Indian Appropriations Act of August 15, 1876, 19 Stat. 176, 192, which cut off all rations for any band of Sioux "while said band is engaged in hostilities against the white people,"[11] and which further provided that "hereafter there shall be no appropriation made for the subsistence of said Indians" unless the Sioux first agreed to sell the Black Hills, to relinquish their off-reservation hunting rights and to grant three right-of-ways through the Great Sioux Reservation. (Pet. App. 7a, 19a.) As the Indian Claims Commission also

[11] This cut-off of appropriations applied not only to gratuities, but also to the payments still due the Sioux under Articles 7, 8 and 10 of the 1868 Treaty.

specifically found in these proceedings, "this provision meant that unless the Sioux ceded the Black Hills to the United States, and surrendered their right to hunt off the reservation, the United States would allow them all to starve." (A. 314; *see* A. 258.)

Following passage of the 1876 Act, the President appointed another commission ("Manypenny Commission") to negotiate with the Sioux. During the autumn of 1876, the Manypenny Commission met with the Sioux at their agencies. (Pet. App. 8a; A. 315.) By this time, the bulk of the Sioux had been disarmed, dismounted and confined within the Great Sioux Reservation, and made wholly dependent upon the United States for their subsistence. (Pet. App. 20a; *see* Govt. Br. 40.) In its meetings with the Sioux, the Manypenny Commission "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." (A. 103.) The Indians were left with no doubt that, if they refused to cede the Black Hills, they would receive no further rations and that the alternative to capitulation to the Government's demands would be starvation. (Pet. App. 20a.)

Notwithstanding the helpless condition in which the Government had placed the Sioux and the ultimatum contained in the 1876 Appropriations Act, less than 10% of the male adult Sioux assented to the Black Hills cession agreement proposed by the Manypenny Commission. (Pet. App. 8a; A. 315.) The agreement, therefore, did not satisfy the requirement in Article 12 of the 1868 Treaty that no cession of land within the Great Sioux Reservation would be valid without the written approval of three-fourths of the adult male

Sioux. (A. 258.) The Manypenny Commission, though, submitted the purported agreement to the President, who in turn submitted it to Congress. (Pet. App. 8a-9a; A. 315.) Congress then "resolved the impasse by enacting into law the unratified agreement" pursuant to the Act of February 28, 1877, 19 Stat. 254. (A. 258; *see also* Pet. App. 9a; A. 315.) This is the chain of events which led the Court of Claims to conclude (A. 261):

> The duplicity of President Grant's course and the duress practiced on the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history * * *.

4. *Provisions of the 1877 Act:* Under the Act of February 28, 1877, *supra,* Congress redefined the boundaries of the Great Sioux Reservation to exclude—and the United States thus acquired clear title to—the Sioux Black Hills country, a tract containing 7,345,157 acres of valuable timber, agricultural and grazing land and the richest gold mines in the world (including, in particular, the Homestake Mine, the foundation of the George Hearst fortune). *See* 33 Ind. Cl. Comm. 151 (1974) at 157, 234-35, 266, 309-12. Under the 1877 Act, Congress also "abrogated" Article 16 of the 1868 Treaty, mandated the cession of Sioux hunting rights under Article 11 of the 1868 Treaty [12]

[12] Under Article 11 of the 1868 Treaty, the Sioux agreed "that they will relinquish all right to occupy permanently the territory outside" the Great Sioux Reservation, "but yet reserve the right to hunt on any lands north of North Platte, and on the Republican Fork of the Smoky Hill River, so long as the buffalo may range thereon in such numbers as to justify the chase." The Article 11 country amounted to about 25 million acres (Govt. Ex. V-1 (map)), so that, together with the "unceded Indian territory"

and took three right-of-ways through the Great Sioux Reservation from the Missouri River to the Black Hills country. (19 Stat. 255; A. 332.) Approximately 900,000 acres on the north side of the Great Sioux Reservation, which the United States had obtained from the Sioux in 1868, were restored to the reservation.

The 1877 Act recited that, "[i]n consideration of the foregoing cession of territory and rights," the United States would furnish the Sioux "schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868," would give "all necessary aid to assist the said Indians in the work of civilization" and also would "provide the said Indians with subsistence consisting of a ration for each individual. . . ." (19 Stat. 256; A. 333.) Congress further stipulated, however, that "[s]uch rations, or so much thereof as may be necessary," would continue to be distributed only "until the Indians are able to support themselves," and subject to three additional limiting conditions:

> (1) rations would be issued only "upon full compliance with each and every obligation" imposed upon the Sioux by the 1877 Act;
>
> (2) "whenever schools shall have been provided by the Government for said Indians, no rations shall be issued for children between the ages of six and fourteen years (the sick and infirm excepted) unless such children shall regularly attend school"; and

established under Article 16 (*see* p. 14, n.10, *supra*), the Sioux possessed rights in over 50 million acres of land outside their permanent reservation.

> (3) "[w]henever the said Indians shall be located upon lands which are suitable for cultivation, rations shall be issued only to the persons and families of those persons who labor, (the aged, sick and infirm excepted;)".

(*Ibid.*) As the court below concluded, "[i]n return for obtaining the Black Hills, the government did not even unqualifiedly undertake to provide all the Sioux with food." (Pet. App. 26a.)

B. Background Of This Litigation

1. *Early History:* For many years after 1877, Federal law prohibited the Sioux from presenting the Black Hills claim for judicial review. The doors of the courts originally were closed to respondents (as well as to other Indian tribes) because the 1863 statute which granted authority to the Court of Claims to render judgments against the United States specifically excepted from that court's jurisdiction "any claim against the government . . . dependent on any treaty entered into . . . with Indian tribes." (*See* Govt. Br. 47 at n.38.) When Congress enlarged the jurisdiction of the Court of Claims in 1887, the same ban against Indian tribal claims unfortunately was carried forward.[13]

Given the rule that, for Indian tribes, no suit could be filed unless Congress passed a special statute waiving sovereign immunity and granting jurisdiction to the courts, the Sioux' only hope for a hearing on the Black Hills claim lay in petitioning Congress for redress. After years of such importuning, Congress in

[13] Act of March 3, 1863, 12 Stat. 744; section 1 of the Tucker Act of March 3, 1887, 24 Stat. 509, codified in 28 U.S.C. 1491.

1920 finally passed a special statute giving respondents permission to sue the United States in the Court of Claims.[14] One case, filed by the Sioux on May 7, 1923, involved the acquisition of the Black Hills under the Act of February 28, 1877, *supra*. The court, however, dismissed the suit in 1942 on the ground that the Black Hills claim fell outside the jurisdiction conferred by the 1920 Act. *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942), *cert. denied* 318 U.S. 789 (1943).

2. *Initial Proceedings Below:* In 1946, Congress created the Indian Claims Commission,[15] a new forum to hear and determine all tribal grievances which previously had arisen, and on August 15, 1950, former Sioux counsel resubmitted the Black Hills claim. Four years later, in an early opinion, the Commission entered a final judgment dismissing the suit on the ground that the Sioux had failed to prove their case.[16] *Sioux Tribe* v. *United States,* 2 Ind. Cl. Comm. 646 (1954). On appeal, the Court of Claims affirmed the dismissal. *Sioux Tribe of Indians* v. *United States,* 146 F. Supp. 229 (Ct. Cl. 1956). At this point, respondents belatedly retained new counsel.

The Sioux thereafter filed with the Court of Claims a motion to vacate the judgment of affirmance, alleging, *inter alia,* that the Commission's decision had

[14] Act of June 3, 1920, 41 Stat. 738.

[15] Act of August 13, 1946, 60 Stat. 1049, codified as 25 U.S.C. 70 *et seq.*

[16] The Commission disposed of this large and complex litigation after a hearing which lasted two hours and 20 minutes. 205 Ct. Cl. at 182, 500 F.2d at 476. At that so-called trial on the merits, prior Sioux counsel placed in the record a total of seven exhibits—the same material introduced in evidence in the earlier case dismissed by the Court of Claims in 1942.

been reached on the basis of an incomplete record due to inadequate representation by former Sioux counsel and that respondents' rights should not be prejudiced by his erroneous factual concessions. The court below granted the Sioux motion, vacated its judgment and directed the Commission to determine:[17]

> (1) whether the claimant Indian tribes are entitled on the basis of the statements made in support of the above motions to have the proof in this case reopened, and (2) if so, to receive additional proof sought to be offered and on the basis thereof, together with the record already made, reconsider its prior decision in this matter.

On November 19, 1958, only two weeks after the remand, the Commission, which had direct knowledge of the earlier proceedings and the quality of prior Sioux representation, entered an order reopening the proof in the case and also announced that it would reconsider its previous holding. (A. 265-66.)

3. *Commission Decision on the Merits:* On November 4, 1960, the Sioux filed an amended petition covering the Black Hills claim, which reiterated the allegation that the Act of February 28, 1877, *supra,* constituted a taking of Sioux land and rights for which just compensation was payable under the Fifth Amendment. Instead of responding to the amended petition within 60 days, as required under Commission Rules 11 and 13, 25 CFR §§ 503.11 and 503.13, the Government postponed the actual filing of its answer until June 28,

[17] *Sioux Tribe of Indians* v. *United States,* App. No. 4-55 (Ct. Cl., Order of November 5, 1958); for a summary of action by the Court of Claims relative to the first appeal in this case, *see* 182 Ct. Cl. 912-13 (1968); *see also Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 182, 500 F.2d 458, 476 (1974).

1966, almost six years after the Sioux had been granted leave to file their amended pleading. During that six-year interval, the United States, on January 19, 1961, first filed a petition with the Court of Claims for a writ of mandamus seeking to upset the Commission's actions upon remand; the petition was denied on February 6, 1961. 182 Ct. Cl. 912-13 (1968). Next, the United States, on June 16, 1961, moved to dismiss the Black Hills claim, a request which the Commission denied on January 30, 1962. Lastly, after four years of silence and consequent delinquency in filing its answer, the United States on March 23, 1966, moved for a clarification of the record, which "clarification" the Commission furnished on May 25, 1966.[18] A month later, the answer to the amended petition finally was forthcoming.

Thereafter, the pace of the litigation before the Commission somewhat quickened. At respondents' request, the Commission on October 29, 1968, set down the following three questions for briefing and determination:

> 1. What land and rights did the United States acquire from the Sioux by the Act of February 28, 1877, C.72, 19 Stat. 254, 1 Kappler 168, and what were the exterior limits (a) of the land so acquired and (b) of the area subject to the rights so acquired?
>
> 2. Was there any consideration for defendant's acquisition of land and rights under the 1877 Act and, if so, what constituted such consideration?

[18] At respondents' suggestion, the Commission on May 25, 1966, entered an order formally splitting the *Sioux* case into Docket No. 74 (1868 Treaty claim) and Docket No. 74-B (Black Hills claim). The full record in both cases is here before the Court.

> 3. If there was no consideration for defendant's acquisition of lands and rights under the 1877 Act, was there any payment for such acquisition?

(A. 266.) With respect to the first question, the Commission ruled in a series of decisions that the United States under the 1877 Act acquired from the Sioux the Black Hills portion of the Great Sioux Reservation, all rights retained by the Sioux under Articles 11 and 16 of the Treaty of April 29, 1868, *supra,*[19] and three right-of-ways through the Great Sioux Reservation.[20] 23 Ind. Cl. Comm. 358 (1970); 24 Ind. Cl. Comm. 98 (1970); 33 Ind. Cl. Comm. 151, 157-58, 229-31 (1974) (A. 269, 296-98). In these opinions, the Commission further defined the exterior boundaries of the Black Hills country, a tract of 7,345,157 acres (A. 269), and the areas subject to Sioux rights under Articles 11 and 16, which each consisted of approximately 25 million acres (*see* pp. 14 at n.10 and 17 at n.12, *supra*).

In addition to ordering the briefing of legal issues, the Commission conducted hearings in November 1969 and May 1970 for the purpose of receiving evidence

[19] The Commission further determined that, although such rights were "compensable interests," the Sioux could recover for their Article 11 and 16 rights only if they could prove that these rights had a greater value in 1877 than when respondents obtained them in 1868. 24 Ind. Cl. Comm. 98 (1970). The Sioux did not pursue this line of proof (A. 267), which counsel believed to be based upon an erroneous legal premise, so the Commission's ultimate award of $17.5 million does not include any compensation for the abrogation of respondents' rights under Articles 11 and 16 of the 1868 Treaty.

[20] For some 300 miles, the Missouri River flowed through the Great Sioux Reservation. Nonetheless, the Commission found that the United States did not acquire a compensable interest when Congress legislated Sioux consent "to the free navigation of the Missouri River" under Article 2 of the 1877 Act. (A. 298.)

and taking the testimony of expert witnesses on value, and, in December 1973, heard oral argument on the question of whether the Black Hills claim involved a taking in violation of the Fifth Amendment. Then, on February 15, 1974, the Commission rendered its principal decision—an opinion, detailed findings of fact and interlocutory order totalling 212 pages (33 Ind. Cl. Comm. 151 *et seq.*)—which held, *inter alia*:

(a) That the Black Hills land and minerals, especially gold, had a fair market value on February 28, 1877, of $17.1 million (33 Ind. Cl. Comm. at 362, 245-357 *passim*);[21]

(b) That the Act of February 28, 1877, *supra,* effected a taking of Sioux land and rights for which just compensation was due under the Fifth Amendment (A. 288-90);

(c) That the United States had waived the defense of *res judicata* and, even in the absence of waiver, the decision of the Court of Claims in *Sioux Tribe of Indians* v. *United States,* 97 Ct. Cl. 613 (1942), did not represent an adjudication on the merits of the Sioux Fifth Amendment claim (A. 273-88);

(d) That $2,250,000 in gold had been removed from the Black Hills by trespassing miners prior to February 28, 1877, and that the gold so removed had a value in the ground of $450,000, for which the United States was liable (A. 292-96; 33 Ind. Cl. Comm. at 357-59);[22] and

[21] The Government does not here challenge the $17.1 million valuation (Govt. Br. 48), and did not challenge the valuation in the court below. (Pet. App. 2a.)

[22] The Government has not questioned this liability of $450,000 for minerals wrongfully removed either before this Court or in the Court of Claims (Govt. Br. 48; Pet. App. 2a), but did successfully challenge the allowance of interest on this sum in the court below. (Pet. App. 34a-38a.)

(e) That the United States was entitled to a credit for food, rations and provisions furnished to the Sioux pursuant to the 1877 Act in an amount to be determined in a subsequent proceeding. (A. 290-92, 299.)

The Government promptly filed an interlocutory appeal pursuant to the Act of September 8, 1960, 74 Stat. 829, 25 U.S.C. 70s(b), as amended.

4. *Appeal by the United States to the Court Below*: The Government's appeal to the Court of Claims from the Commission's interlocutory ruling was limited to the proposition that the Sioux' Fifth Amendment claim should have been barred by *res judicata,* including collateral estoppel, or, in the alternative, that the 1877 Act did not effect a taking of the Black Hills country for which just compensation is due. Over Judge Davis' dissent, and without reaching the merits, a majority of the court below held that its 1942 opinion in *Sioux Tribe of Indians* v. *United States, supra,* whether "rightly or wrongly" decided (A. 263), did give rise to a valid *res judicata* defense to respondents' claim for just compensation under the Fifth Amendment. *United States* v. *Sioux Nation,* 207 Ct. Cl. 234, 518 F.2d 1298 (1975). This Court denied certiorari. *Sioux Nation* v. *United States,* 423 U.S. 1016 (1975).

While the Government's appeal was pending, Congress approved the Act of October 27, 1974, 88 Stat. 1499. That act was primarily directed to the Sioux

Black Hills case and amended section 2 of the Indian Claims Commission Act to provide that, in the determination of offsets, "expenditures for food, rations, or provisions shall not be deemed payments on the claim." (25 U.S.C. § 70a, as amended.) As explained in the report of the Senate Committee on Interior and Insular Affairs:

> Although couched in general terms, this amendment is directed to one basic objective—expediting the Indian Claims Commission's disposition of the famous Black Hills case which has been under consideration in the courts without a final decision since 1923. * * *
>
> The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.
>
> The amendment to S. 3007 is designed to correct this inequity by amending section 2 of the Indian Claims Commission Act to provide that "food, rations or provisions" shall not be deemed to be payments on a land claim. In the Black Hills case, such a change in the law also would eliminate the necessity for a prolonged and expensive GSA investigation into the amount of rations furnished under the 1877 Act, and thus would move this long-delayed claim a substantial way further towards a final decision. That result is in the interest of both the United States and the Sioux.

S. REP. No. 93-863, 93rd Cong., 2d Sess. (1974), reprinted in 1974 *U.S. Code Congressional and Administrative News,* vol. 3, pp. 6111, 6112, 6115. When so amending the Indian Claims Commission Act, Congress was well aware that its action might result in a judgment on the Black Hills claim "in the amount of approximately $100 million." (120 CONG. REC. H. 35643 (1974); *see* Pet. App. 38a.)

In light of the 1974 Act, the Court of Claims thought that the still-pending offset question in this litigation was largely resolved (A. 260), but remanded the case to the Commission for final disposition. (A. 263.)

5. *Final Commission Proceedings*: After the Court of Claims' remand in 1975, the Government advised the Commission that its claim pursuant to 25 U.S.C. § 70a for the allowance of gratuitous offsets in the Black Hills case (Docket No. 74-B), if any, would be reserved for presentation in the Sioux 1868 Treaty case (Docket No. 74), which still is pending. (*See* p. 7, n.5, *supra.*) In addition, the parties agreed that the three right-of-ways through the Great Sioux Reservation obtained by the United States under the Act of February 28, 1877, *supra,* had a fair market value of $3,484.[23] Finally, the Commission set down for trial the factual question—previously briefed with respect to legal issues pursuant to its order of October 29, 1968 (pp. 22-23, *supra*) and partially decided in 1974 (A. 290-92)—of what expenditures the United States actually had made for the benefit of the Sioux under

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[23] This agreement raised the principal amount of the Sioux award to $17,553,484—$17.1 million for the land, $450,000 for gold wrongfully removed by miners before the 1877 Act, and $3,484 for the three right-of-ways. (Pet. App. 2a.)

the 1877 Act. Thus, the Commission gave the Government a specific opportunity to demonstrate "the extent of defendant's payments on plaintiffs' claim . . ." for purposes of establishing possible legal offsets. (A. 316.)

Thereafter, on May 19, 1976, Commissioner Vance, to whom the matter had been assigned, issued his preliminary decision on this question, pursuant to Commission Rule 26, 25 C.F.R. § 503.26, as follows:

> 2. What payments have been made by defendant on plaintiffs' claims arising out of the Act of February 28, 1877?
>
> [Answer:] None.

(*Ibid.*) By successive orders of the Commission, the Government's time to except to Commissioner Vance's report was extended to November 15, 1976. On October 15, 1976, however, the Government advised the Commission that "defendant has decided not to press its setoff claims any further," and Commissioner Vance's report, therefore, became a final order of the Commission. 25 C.F.R. § 503.27. The Government never appealed from or otherwise challenged that ruling.

On October 15, 1976, the Government also moved the Commission to enter a final award in favor of respondents in the amount of $17,553,484. The Commission, though, concluded that "the entry of final judgment in this docket ought to be deferred" in view of the pendency of legislation dealing with the case, and on November 10, 1976, entered an order directing that defendant's motion be held in abeyance. There the matter rested at the time that Congress passed the Act of March 13, 1978. (For full text, *see* pp. 4-5, *supra.*)

6. *Review Pursuant to the 1978 Act*: The 1978 Sioux special jurisdictional act provided that, upon application by respondents, "the Court of Claims shall review on the merits, without regard to the defense of res judicata or collateral estoppel, that portion of the determination of the Indian Claims Commission entered February 15, 1974, adjudging that the Act of February 28, 1877 (19 Stat. 254), effected a taking of the Black Hills portion of the Great Sioux Reservation in violation of the fifth amendment, and shall enter judgment accordingly." The 1978 Act further provided that, "[i]n conducting such review, the court shall receive and consider any additional evidence, including oral testimony, that either party may wish to provide on the issue of a fifth amendment taking and shall determine that issue de novo."

The Sioux timely filed an application for review. Neither party requested a hearing or offered additional evidence, so the case was submitted to the court below on the basis of the existing record. (Pet. App. 5a.)

The Court of Claims, sitting *en banc*,[24] affirmed the Indian Claims Commission's decision that the 1877 Act had effected a taking of the Sioux Black Hills country in violation of the Fifth Amendment. In so holding, the court below first referred to the well-settled rule that, "when the United States appropriates property interests of others, that constitutes a taking under the fifth amendment, for which the

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[24] Chief Judge Friedman, author of the opinion below, was joined by Senior Judge (and former Chief Judge) Cowen, Judge Davis and Judge Smith. Judge Nichols concurred; Judges Bennett and Kunzig dissented.

United States is obligated to pay just compensation." (Pet. App. 9a.) The court, however, then stated its own rule in Indian cases—which this Court never has sanctioned—that a legislative appropriation of tribal lands without payment of just compensation does not constitute a taking "[w]here Congress makes a good faith effort to give the Indians the full value of the land," citing *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 553, 390 F.2d 686, 691 (1968). (*Id.* at 10a.)

Having established the latter "guideline" for its analysis, the Court of Claims next inquired into whether Congress actually had made a "good faith effort" to give the Sioux a full and fair equivalent for the Black Hills, and determined that it had not. In undertaking this inquiry, the court below carefully noted that the "subjective motive of the legislature" in taking action was not involved, but only the objective facts, "as revealed by Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (Pet. App. 11a.) Based upon an exhaustive study of such legislative materials (*id.* at 12a-26a), the Court of Claims concluded that "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equivalent of the value of the lands the United States was acquiring from them." [25] (*Id.* at 26a.)

[25] Petitioner asserts incorrectly that the court below placed upon Congress "the burden of justifying its action" and a requirement

In arriving at its decision that Congress did not make a "good faith effort" to pay the Sioux just compensation for their property, the court below also pointed out that, "[i]n return for obtaining the Black Hills, the government did not even unqualifiedly undertake to provide all the Sioux with food." (Pet. App. 26a.) Petitioner's claim that the United States ultimately spent more for rations than the Black Hills were worth in 1877, which respondents dispute (*id.* at 9a), was dismissed as irrelevant. Again citing *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* the court below ruled that "the subsequent payment to those wards of amounts that in hindsight appear to equal or even exceed the fair value of the property does not make the initial acquisition any the less a fifth amendment taking." (Pet. App. 28a.)

Finally, the Court of Claims aptly distinguished *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), upon which the Government literally had based its entire argument. Specifically, the court noted that *Lone Wolf* involved the constitutional power of Congress to break treaties with Indian tribes, a well-recognized power which respondents do not challenge in this litigation. As the court below further observed, the Black Hills case involves the follow-on question of whether the United States must pay just compensation for tribal property acquired in violation of a treaty, and this

to state affirmatively that the Sioux received a fair equivalent for the Black Hills. (Govt. Br. 45.) A fair reading of the Court of Claims' opinion shows that it was conducting a balanced inquiry into whether Congress actually had made a "good faith effort" to pay respondents full value for their property and the absence of any such "effort" had to be expressed in the negative language about which the Government complains. (*Id.* at 46, n.37.)

issue the *Lone Wolf* court lacked jurisdiction to determine. (Pet. App. 28a-32a.) The Court of Claims then properly concluded that the Sioux Black Hills claim had to be resolved in accordance with the principles laid down in the post-*Lone Wolf* decisions where this Court repeatedly has declared that, if the United States takes Indian property for its own use or to give to others, it must pay just compensation. (*Id.* at 32a-33a.)

In accordance with the foregoing opinion, the Court of Claims on July 31, 1979, entered a final judgment for the Sioux Nation in the amount of $17,553,484, with interest at 5% from February 28, 1877, "as a measure of just compensation" upon the major portion of that sum.[26] (Pet. App. 71a-73a.) The United

[26] The amount of interest payable is large because the Black Hills case is old, but Congress never thought that the age of their claims should deprive aggrieved Indians of appropriate relief. In its report on the bill which became the Indian Claims Commission Act of 1946, the House Committee on Indian Affairs stated that "[t]here is substance, as well as eloquence, in the plea of a group of Indians from the State of Washington:

> "We are told that you * * * have said that our claims are too old. Who made them old; who delayed the settlement? We are your children; we are your wards; we can do nothing without your consent. We have been—we are now helpless unless you act. We cannot bring suit against you in your courts. If settlement with us has been delayed, it has been due to your own fault. It is not the fault of the poor, ignorant, helpless Indian. Will you take advantage of your own fault? Will you say, I delayed a long time settling with my children; now because I delayed so long I will not settle with them at all? An Indian does not so pay his debt. If he cannot pay it his children pay it. We cannot believe that you * * * meant to take advantage of the poor Indian, and refuse to pay him because of your own delay."

H. REP. No. 1466, 79th Cong., 2d Sess. 5 (1945). In response to the further argument that the recoveries by Indian tribes under the Claims Act might be "large," the House Committee responded:

States petitioned for a writ of certiorari on October 19, 1979, and the writ was granted by the Court on December 10, 1979. As in the court below, the Government does not here deny liability for the fair market value of the property it acquired, but does seek, despite its more than 100-year delay in payment of that principal amount, to avoid the payment of interest as a measure of just compensation under the Fifth Amendment.[27]

SUMMARY OF ARGUMENT

I

The land taken from the Sioux by the Act of February 28, 1877, was property within the meaning of the Fifth Amendment and the Sioux are entitled to the same measure of just compensation as any other landowner. The United States twice recognized Sioux title to the Black Hills country by treaty. Perhaps the most fundamental principle in all Indian law, a principle ignored by the Government here, is the distinction consistently drawn by this Court between recognized title to Indian lands and mere aboriginal title. Aboriginal

> If the Government could save some millions of dollars by refusing to pay its just debts to its Indian citizens and by continuing to refuse them access to the courts for the enforcement of obligations that the Federal Government freely assumed, it could save even more by denying its white citizens access to the Court of Claims. But nobody has yet suggested that the Government of the United States should balance its budget by defaulting on its outstanding obligations to its white citizens and denying them access to the courts. Why should we do this to our Indian citizenry? * * *

(*Id.* at 9.)

[27] The 1877 value of the Black Hills would be paid in 1980 dollars and thus, even with interest, would be less than the 1877 value of the property in 1877 dollars.

title may be extinguished by the United States without the payment of just compensation. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). Treaty-recognized title is "property within the meaning of the Fifth Amendment," *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937), and cannot be taken without payment of just compensation.

This Court in *Shoshone Tribe* and numerous other decisions has applied precisely the same rules for determining whether a taking of tribal treaty-protected lands has occurred as were applied in non-Indian cases. Moreover, the Court in *United States* v. *Creek Nation,* 295 U.S. 103 (1935), specifically rejected the Government's argument that, because of the special relationship of the United States to Indian tribes, a different standard applies to takings of reservation lands.

The United States did not pay just compensation to the Sioux for the gold-rich Black Hills and petitioner, in effect, so concedes. The 1877 Act provided no payment. Under the 1877 Act, the Government merely made a conditional promise to furnish an indeterminate number of Sioux with a limited ration of beef, bacon and flour for an indeterminate number of years. Just compensation is not a conditional promise to pay, but rather requires an exact and full equivalent for the fair market value of the land.

The Government's contention that Congress in 1877, or this Court today, would consider a promise to provide food to be just compensation for the lands and rights taken from the Sioux Nation is demeaning to the United States. The Sioux needed food because the Government already had taken the bulk of their homeland and had encouraged destruction of the buffalo

herds upon which their livelihood depended. To argue under such circumstances that limited Government rations constituted payment in full for the Black Hills is unconscionable. As the Senate Committee on Interior and Insular Affairs observed in 1974, in legislating that these same rations could not be used as an offset:

> Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land that it took.

This Court's decision in *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), does not support the Government's position. *Lone Wolf* upholds the power of Congress to take the Sioux lands without the consent of the Indians and in violation of the 1868 Sioux Treaty. Nothing in the opinion may properly be construed to relieve the United States of the constitutional obligation to pay just compensation when Congress did so. *Shoshone Tribe* and other cases, which establish that tribal recognized title is protected by the Fifth Amendment, all were decided after *Lone Wolf.* Indeed, in *Shoshone,* this Court specifically referred to *Lone Wolf* and held that the power to abrogate a treaty "does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, *without rendering, or assuming an obligation to render just compensation.*'" (299 U.S. at 498; emphasis supplied.) Moreover, *Lone Wolf* was based largely on the concept prevalent in 1903 that Congress' power over Indians is "a political one, not subject to be controlled by the judicial department of the government." 187

U.S. at 565. This Court, citing *Lone Wolf*, specifically rejected that proposition in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73 (1977) at 84.

In sum, applying well-established principles, the Sioux Nation is entitled to just compensation for the land and rights taken by the United States under the 1877 Act.

II

The Court of Claims in 1968 developed, and in this case relied upon, a more restrictive test for determining whether a Fifth Amendment taking of tribal recognized title has occurred—a test which this Court never has reviewed. In the opinion of the court below, if Congress clearly failed to make a "good faith effort" to pay the Indians the fair value of the property taken, they are entitled to just compensation, but not otherwise. Even applying this restrictive test, the Court of Claims, sitting *en banc,* held that Congress did not in fact make a "good faith effort" to pay the Sioux a full and fair equivalent for the Black Hills and thus that the 1877 Act effected a taking.

In so ruling, the court below examined in detail the sordid story of the Grant Administration's conduct towards the Sioux during the critical period 1874-1877, a course of action which the court previously and correctly had characterized as probably the most "ripe and rank case of dishonorable dealings . . . [to] be found in our history." (A. 261.) The court further studied the legislative histories of both the 1877 Act and the predecessor 1876 Indian Appropriations Act, including "congressional committee reports, statements submitted to Congress by government officials,

reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (Pet. App. 11a.) Based upon a thorough analysis of these legislative materials, the Court of Claims rightly concluded that Congress never even discussed paying compensation for the Black Hills or considered whether its conditional promise of rations was a fair equivalent for the value of the Sioux lands and rights the United States was acquiring. The Government's argument that its conduct really benefited the Sioux is unsupported by the record and properly was rejected by the court below.

In prior decisions, the Court of Claims has found a "good faith effort" to pay fair value where Congress contemporaneously ordered an impartial appraisal of the lands taken. Here, however, Congress did not provide for an appraisal of the value of the Sioux land and rights in 1877. Indeed, the court below, looking beyond what Congress did to what Congress may have thought, still could find no indication of a "good faith effort" to pay the Sioux the 1877 value of their property.

III

The Government argues in this case for the first time in any court that the United States, because it is trustee for the Sioux, need not pay just compensation "if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." The United States also seeks the strongest presumption that any legislation by Congress was intended to promote the welfare of the Sioux, and argues that, if any rational basis for the legislation can be shown, just

compensation is not owed. This harsh standard should be rejected.

The Government's fiduciary duty to Indian tribes surely does not justify affording the tribes *less* protection for their treaty-recognized land than would be afforded other property owners. The consistent decisions of this Court from *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, in 1831 to the present have held the Government to "the most exacting fiduciary standards" in dealing with tribal property, *Seminole Nation* v. *United States,* 316 U.S. 286, 296 (1942), and to an "overriding duty to deal fairly with Indians," *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974). At the very least, the decisions of this Court stand for the principle that the United States in carrying out its fiduciary duty to Indians must observe no lower standard in dealing with tribal trust property than is owed with respect to any other private property.

The Government's argument that the obligation of the United States to provide for the needs and welfare of the Sioux gives it a right to take Sioux property for less than fair value is inherently false. A trustee, particularly as here a self-dealing trustee, may be empowered to transmute the property of the beneficiary, but not for less than full value. Moreover, the United States is subject to both the limitations inhering in guardianship *and* pertinent constitutional restrictions. *United States* v. *Creek Nation,* 295 U.S. *supra* at 110. Where Congress pays Indians less than just compensation for their property, the pertinent provisions of the Fifth Amendment are applicable.

The Government improperly seeks to apply a "rational basis" standard to the promise of rations made by the United States under the 1877 Act. The rational basis test has been promulgated by the Court as a ground for determining whether Congress acted within its constitutional authority over Indian affairs. The validity of the 1877 legislation by which Congress took Sioux land and rights, however, is not here challenged. The rational basis test thus is wholly irrelevant to the issue before the Court: whether the United States, having exercised its constitutional power to acquire the Black Hills, is required to pay just compensation for the property taken.

Finally, the test for just compensation proposed by the Government would deny Indian tribes equal protection of the law. No valid reason exists why treaty-recognized tribal lands, property within the meaning of the Fifth Amendment, should receive less protection than any other property. This Court has rejected that proposition in both *Creek Nation* and *Shoshone Tribe.* To create such a distinction now would put at risk the lands of all present day American Indian tribes. Moreover, to sustain the Government's argument would mean that Congress can take Indian lands and other property rights without paying just compensation so long as it provides any arguable benefit for the tribe, regardless of the value of the property taken and the paucity of the payment. Indian recognized title then would become little more than a tenancy by sufferance terminable at the pleasure of Congress—a result expressly rejected by the Court on repeated occasions.

ARGUMENT

I. The Sioux Nation Is Entitled to Just Compensation Under the Constitution for the Taking of Its Treaty-Protected Lands and Rights on the Same Basis and to the Same Extent as Any Other Property Owner.

A. The Black Hills portion of the Great Sioux Reservation, to which respondents possessed recognized title, is property within the meaning of the Fifth Amendment.

Under the Treaty of September 17, 1851, 11 Stat. 749, the United States recognized the title of the Sioux Nation to a substantial tract of land lying west and south of the Missouri River, including the Black Hills country here before the Court. *Sioux Tribe* v. *United States,* 205 Ct. Cl. 148, 500 F.2d 458 (1974). Under Article 2 of the Treaty of April 29, 1868, *supra,* with various bands of the Sioux Nation, the United States reconfirmed that the Great Sioux Reservation, including the Black Hills country, was "set apart for the absolute and undisturbed use and occupation of the Indians herein named. . . ." The Government does not here dispute that respondents possessed treaty or recognized title to the lands and rights acquired by the United States under the Act of February 28, 1877, *supra.*

Perhaps the most fundamental principle in all Indian law is the distinction drawn by this Court between recognized title and aboriginal or original Indian title. Aboriginal title is an Indian right to use and occupancy, never formalized by treaty or statute, which is valid against third parties,[28] but which the United States may extinguish without payment of just compensation under the Fifth Amendment. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955); *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48 (1951). By contrast, Indian reservations set aside by treaty or statute, and thus held under recognized title, are vested interests protected even against the United States by the Fifth Amendment to the Constitution. *United States* v. *Klamath & Moadoc Tribes,* 304 U.S. 119, 123-24 (1938); *Shoshone Tribe* v. *United States,* 299 U.S. 476, 496-97 (1937); *United States* v. *Creek Nation,* 295 U.S. 103, 109-10 (1935). Indeed, while holding in *Tee-Hit-Ton Indians* v. *United States, supra,* that aboriginal title is non-compensable, the Court reaffirmed that "where the Congress by treaty or agreement has declared that thereafter Indians were to hold the lands permanently, compensation must be paid for subsequent taking." 348 U.S. at 277-78.

The Black Hills portion of the Great Sioux Reservation thus is property within the meaning of the Fifth Amendment and entitled to its protection.

B. Indian tribes are entitled to the same measure of just compensation for the taking of their property by the United States as any other landowner.

In every case where an Indian tribe has sued the United States for an eminent domain taking of recognized title lands, this Court has determined that the Indians are entitled to just compensation on the same basis and to the same extent as non-Indian claimants.[29] In the leading case of *Shoshone Tribe* v. *United States,*

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[28] *See United States* v. *Santa Fe Pacific R. Co.,* 314 U.S. 339, 347 (1941); *Johnson* v. *McIntosh,* 21 U.S. (8 Wheat.) 543 (1823).

[29] As early as 1890, the Court declared that just compensation under the Fifth Amendment must be paid where Congress authorized construction of a railroad through lands patented to an Indian tribe. *Cherokee Nation* v. *Southern Kansas R. Co.,* 135 U.S. 641 (1890). The Court specifically observed that "[t]he Consti-

supra, for example, Mr. Justice Cardozo, after pointing out that the tribe's treaty-protected reservation was "property within the meaning of the Fifth Amendment" (299 U.S. at 497), also declared for a unanimous Court that "the right of interest or a fair equivalent attaches itself automatically to the right to an award of damages" for a taking of a part of such property. (*Ibid.*) This proposition that Indian tribes, such as the Sioux, are entitled to interest or its equivalent in just compensation cases is settled law. *United States* v. *Klamath & Moadoc Tribes, supra; United States* v. *Shoshone Tribe,* 304 U.S. 111 (1938); *United States* v. *Creek Nation, supra; Yankton Sioux Tribe* v. *United States,* 272 U.S. 351 (1926).

Significantly, the Court in *Shoshone Tribe* relied upon non-Indian condemnation cases and applied the same standards to a taking of treaty-recognized Indian reservation lands as to property held in fee-simple ownership.[30] Conversely, the Court has relied without distinction upon *Shoshone Tribe* and other tribal taking cases in its decisions concerning claims by non-Indian property owners to just compensation

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tution declares that private property shall not be taken 'for public use without just compensation' " (135 U.S. at 659) and stated:

> The lands in the Cherokee territory, like the lands held by private owners everywhere within the geographical limits of the United States, are held subject to the authority of the general government to take them for such objects as are germane to the execution of the powers granted to it; *provided only, that they are not taken without just compensation being made to the owner.*

(*Id.* at 657; emphasis supplied.)

[30] *See* 299 U.S. at 497. The principal cases relied upon were *Jacobs* v. *United States,* 290 U.S. 13 (1933); *Hurley* v. *Kincaid,* 285 U.S. 95, 104 (1932); and *United States* v. *Cress,* 243 U.S. 316, 327-30 (1917).

under the Fifth Amendment. *Kieselbach* v. *Commissioner of Internal Revenue,* 317 U.S. 399, 403 (1943) (the "value at the time of taking plus compensation for delay in payment equals just compensation"); *see also Albrecht* v. *United States,* 329 U.S. 599, 602 (1946); *Smyth* v. *United States,* 302 U.S. 329, 353-54 (1937).[31] The conclusion seems inescapable that no special rules have been established by the Court for just compensation claims by Indian tribes, but rather that the Fifth Amendment applies on exactly the same basis to a treaty-recognized Indian reservation as to any other lands and property in the United States.

The Government is simply wrong in contending that the Court "has consistently sustained every purported exercise of the power to control tribal property which could reasonably be said to benefit the tribe against tribal challenges that they were takings of property under the Fifth Amendment." (Govt. Br. 53; *see* pp. 50-54, *infra.*) Some of the just compensation cases considered by this Court, such as *Creek Nation, supra,* and *Shoshone Tribe, supra,* concern disposals of tribal property by the United States with no obvious benefits provided to the Indians.[32] Other cases,

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[31] Similarly, the courts of appeal never have distinguished Indian eminent domain cases on the ground that tribes were the property owners, but have relied upon the Indian cases interchangeably with non-Indian eminent domain cases. *E.g., Farrand Optical Co.* v. *United States,* 325 F.2d 328, 336 (C.A. 2, 1963); *United States* v. *Silver Queen Mining Co.,* 285 F.2d 506, 508 (C.A. 10, 1960); *Ericsson Line, Inc.* v. *United States,* 134 Ct. Cl. 767, 775-76 (1956); *United States* v. *Jordan,* 186 F.2d 803, 807 (C.A. 6, 1951); *United States* v. *Daily,* 116 Ct. Cl. 723, 733 (1950); *United States* v. *Playa de Flor Land & Improvement Co.,* 160 F.2d 131, 139 (C.A. 5, 1947).

[32] In *Creek Nation,* the United States conveyed treaty-recognized tribal land to non-Indian settlers (295 U.S. at 107). A question

like *United States* v. *Klamath & Moadoc Tribes, supra,* did involve circumstances where Congress paid inadequate value for the land.[33] Contrary to petitioner's thesis, in no case has this Court refused just compensation for recognized title lands on the ground that the Government made some payment to the Indians—and, indeed, in *Shoshone Tribe* the Court expressly rejected the Government's contention that no taking had occurred because the tribe suffered only a partial loss of its property (299 U.S. at 498). As the Court of Claims held in *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 559, 390 F.2d 686, 695 (1968):

> It is true that, in many of the cases where a taking was held to have occurred, defendant paid nothing for the land. However, a payment of nothing is merely the clearest and most extreme example of the failure of Congress to pay full value. * * * There is no basis in reason to distinguish between no compensation, minimal compensation, or compensation arbitrarily determined.

In sum, this Court consistently and repeatedly has decided that the full protection of the Fifth Amendment applies, without qualification, to Indian recognized title lands. The just compensation clause deals with property, not people (*Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 326 (1893)), and, accordingly, has been applied equally by the Court to the property of Indian tribes and other persons. This is simple justice and attention to the Constitution.

C. The United States never paid just compensation to the Sioux for the land and rights acquired under the Act of February 28, 1877.

As we read its brief, the Government does not here argue that the 1877 Act provided just compensation to the Sioux for the 7,345,157 acres of gold-rich land then taken by the United States. Petitioner claims that "the Congress of 1877 meant to give fair value for the Black Hills" (Govt. Br. 66; *see* pp. 62-71, *infra*) or that the Government over a 74-year period eventually spent on the Sioux more than their land and rights in 1877 were worth (see pp. 74-77, *infra*), and elsewhere asserts that "we must assume Congress deemed [its] undertaking a *fair* consideration. . . ." (Govt. Br. 63; emphasis in original.) Nowhere, though, does petitioner contend that the United States in fact paid the Sioux the full value of their property or, in other

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was raised as to whether, because the United States was trustee for the Creek Nation, such action amounted to a taking of the land (*id.* at 109). The Court held that the Government's power to control and manage Indian land was "subject to limitations inhering in such a guardianship *and to pertinent constitutional restrictions.*" (*Id.* at 110; emphasis supplied.) Thus, rather than granting the United States an exemption from Fifth Amendment requirements or extraordinary powers in disposing of Indian recognized title, the Court held that there were two limitations upon the Government, those imposed by its gurdianship and, in addition, the limits imposed by the Constitution.

[33] In the petition for a writ of certiorari, the Government conceded that the Indians were provided some compensation for the Klamath lands, but characterized the payment as "derisory." (Pet. 11.) Now the Government argues that the Indians were paid nothing at the time of taking, since the taking was authorized by a 1906 act and the inadequate payment was not appropriated until 1908. (Govt. Br. 56-57, n.48.) The court below, on the other hand, correctly described the *Klamath* taking and subsequent payment as "related parts of a single transaction." (Pet. App. 32a, n.7.)

The Court of Claims frequently has found a Fifth Amendment taking where the United States made some, but inadequate payment. *E.g., Ponca Tribe of Indians of Okla.* v. *United States,* 183 Ct.Cl. 673, 688 (1968); *see* cases cited at p.57, n.44, *infra.*

words, just compensation within the meaning of the Fifth Amendment.[34]

The Government's failure to claim actual payment of just compensation is understandable. The 1877 Act did not provide any payment to the Sioux at the time their lands and rights were acquired by the United States. Instead, Article 5 of the 1877 Act specified that, in "consideration" for the property taken, the United States agrees: (1) to furnish "all necessary aid to assist the said Indians in the work of civilization"; (2) to furnish the Sioux "schools and instruction in mechanical and agricultural arts," as provided under the Treaty of April 29, 1868, *supra;* and (3) to furnish the Sioux with subsistence consisting of "a ration for each individual of a pound and a half of beef, (or in lieu thereof, one half pound of bacon), one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs."

The Government's first promise contains no express commitment and is stated in such general terms as to have no ascertainable value. (A. 289.) In its second promise, the Government merely agreed to perform pre-existing obligations under the 1868 Treaty and so granted the Sioux nothing to which they were not already entitled.[35] As the Court of Claims determined,

[34] The United States has not sought review of the judgment of the Court of Claims awarding respondents $17.5 million as the 1877 value of the lands and rights acquired from the Sioux by the United States under the 1877 Act. (Pet. 8; Govt. Br. 4.)

[35] The Government's promise to assist in the "civilization" of the Sioux through education is also a standard public policy provision which the United States had long been inserting in Indian treaties, regardless of the size of the monetary payments being made or whether the tribe was ceding recognized title lands. *See, e.g.*, Treaty of July 3, 1868, 15 Stat. 673, with the Shoshone Tribe (Art. 7); Treaty of June 1, 1868, 15 Stat. 667, with the Navajo Tribe (Art. 6); Treaty of June 9, 1855, 12 Stat. 951, with the Yakima Tribe (Art. 5).

the promise to furnish the Sioux with rations is "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of the land" (Pet. App. 21a), and that undertaking fell far short of just compensation.

Specifically, the United States under the 1877 Act did not promise to provide all the Sioux unconditionally with subsistence for a finite period. The Government promised only to furnish rations until such time as the Sioux could support themselves.[36] In addition, the right of the Indians to receive rations was qualified by provisions that food would not be supplied to children between the ages of 6 and 14 who did not regularly attend a government school or to adults (and their families) who lived upon land suitable for cultivation but did not "labor." The court below found that these conditions and limitations "show that the government's undertaking to furnish rations to the Indians . . . was an attempt to coerce the Sioux into capitulating to congressional demands,"[37] not a payment for the land. (Pet. App. 26a-27a.)

[36] The court below concluded that "Congress hoped and anticipated that in a relatively short time the Sioux would learn the ways of civilized society and become self-sufficient." (Pet. App. 27a.)

[37] The debates on the Indian Appropriations Act of August 15, 1876, *supra*, and predecessor bills are replete with evidence that Congress viewed rations not as compensation, but primarily as a

Moreover, just compensation requires a more exact equivalent for the property taken than a promise to furnish rations to an indeterminate number of Sioux for an indeterminate number of years (*Monongahela Navigation Co.* v. *United States, supra*), particularly where both conditions were subject to the absolute control of the United States. Just compensation is not a *promise to pay,* much less a promise of an indefinite payment over an indefinite period of time. Just compensation is (1) "the value of the property at the time of the taking"[38] and (2) "such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Jacobs* v. *United States,* 290 U.S. 13, 17 (1933), quoting *Seaboard Air Line R. Co.* v. *United States,* 261 U.S. 299, 306 (1923). Respondents can find no appellate case that has held, or in which the United States has asserted, that a conditional promise of future payments constitutes just compensation. In two district court cases, such arguments were made, rejected, and no appeal was taken. *United States* v. *9.94 Acres of Land,* 51 F. Supp. 478, 482-84 (E.D. S.C. 1943); *United States* v. *60,000*

mechanism of social control—a technique for keeping Indians on the reservation. *See, e.g.*, 4 CONG. REC. 1796 (Sens. Hitchcock and Bogy); 3502-3 (Cong. Randall); 3570 (Cong. Steele); 3902 (Sen. Windom). Indeed, for this reason, a Senate amendment to the legislation also required that the Sioux agree to receive "all supplies at such points on their said reservation, and in the vicinity of the Missouri River, as the President may designate * * *." 4 CONG. REC. 3902 (June 20, 1876).

[38] As put by Mr. Justice Holmes, speaking for the Court in *Old Dominion Land Co.* v. *United States,* 269 U.S. 55, 65 (1925):

> In the often quoted language of Chief Justice Shaw: "If a pie-powder court could be called on the instant and on the spot, the true rule of justice for the public would be, to pay the compensation with one hand, while they apply the axe with the other." (Citation omitted.)

Square Feet of Land, 53 F. Supp. 767 (N.D. Cal. 1943). The district court held in the latter case that "'just compensation' does not mean a promise, howsoever well intentioned, to perform an act in the future." 53 F. Supp. at 771.

Finally, the idea that Congress in 1877, or this Court today, would consider food to be just compensation for the lands and rights taken from the Sioux Nation is demeaning to the United States. The Sioux were in need of subsistence because the Government already had forced a cession of the major part of their homeland under the 1868 Treaty and had embarked upon a western settlement policy which was destroying the buffalo herds upon which their very existence depended. To argue under such circumstances that a promise of limited government rations constituted payment in full for the Black Hills is unconscionable. As the Senate Committee on Interior and Insular Affairs observed in 1974, when recommending legislation to eliminate food, rations and provisions from consideration as payments on a claim under section 2 of the Indian Claims Commission Act (pp. 26-27, *supra*):

> The facts are, as the Commission found, that the United States disarmed the Sioux and denied them their traditional hunting areas in an effort to force the sale of the Black Hills. Having violated the 1868 Treaty and having reduced the Indians to starvation, the United States should not now be in the position of saying that the rations it furnished constituted payment for the land which it took. In short, the Government committed two wrongs: first, it deprived the Sioux of their livelihood; secondly, it deprived the Sioux of their land. What the United States gave back in rations should not be stretched to cover both wrongs.

To conclude, the Government's conditional promise to supply rations to the Sioux in accordance with the 1877 Act was not payment of just compensation under the Fifth Amendment for the land and rights then acquired by the United States—and petitioner, in effect, so concedes.

D. This Court's decision in *Lone Wolf* v. *Hitchcock* does not relieve the United States of its Fifth Amendment obligation to pay the Sioux just compensation.

Petitioner's principal argument is its contention that the Court in two cases has ruled "that legislation disposing of tribal property for the benefit of the tribe (but over its objection) did not constitute a taking under the Fifth Amendment," citing *Lone Wolf* v. *Hitchcock,* 187 U.S. 553 (1903), and *Cherokee Nation* v. *Hitchcock,* 187 U.S. 294 (1902). (Govt. Br. 53.) The cases do not so hold.

In *Cherokee Nation* v. *Hitchcock, supra,* the tribe sought to enjoin the Secretary of the Interior from leasing tribal property under an 1898 statute without the Indians' consent. The Cherokee Nation did not claim that the act was unconstitutional, but rather alleged that, since it owned the lands in fee simple, it possessed the right exclusive of Congress to control their use. 187 U.S. at 295, 298. The Court did not agree, holding that the tribe still was "in a condition of pupilage or dependency" and thus subject to the "plenary power of control by Congress." (*Id.* at 305, 306.) At the conclusion of its opinion, the Court observed that "[t]here is no question involved in this case as to the taking of property" (*id.* at 307), a sentence upon which the Government here seizes (Br. 53, n.44); the statement was true not because of any denial by the

Court of a Fifth Amendment claim, but because the Cherokee Nation did not and could not seek money damages or just compensation in a suit to which the United States was not a party .

Lone Wolf v. *Hitchcock, supra,* was a suit brought by the principal chief of the Kiowa Indians to enjoin the Secretary of the Interior from implementing a 1900 statute opening certain tribal reservation lands for allotment and sale to settlers.[39] Plaintiff there contended that Congress could not constitutionally dispose of the tribal lands unless three-quarters of the adult male Indians agreed in writing to the cession, as required under the provisions of a treaty comparable to Article 12 of the 1868 Sioux Treaty. 187 U.S. *supra* at 564. The Court rejected this position and held that Congress possessed the plenary power to break a treaty with an Indian tribe unilaterally. (*Id.* at 564-65.) The case turned upon the constitutional authority of Congress to act and serves as precedent in this case for the proposition, which respondents do not deny, that Congress had the power to take the Black Hills from the Sioux against their will and in violation of the 1868 Treaty.

The Court in *Lone Wolf* had no occasion to pass upon whether the 1900 Kiowa act gave rise to a claim for just compensation under the Fifth Amendment because that obvious follow-on question was not then open for adjudication.[40] The United States was not a

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[39] *Cf. Rosebud Sioux Tribe* v. *Kneip,* 430 U.S. 577 (1977); *Mattz* v. *Arnett,* 412 U.S. 481 (1973).

[40] *Lane* v. *Pueblo of Santa Rosa,* 249 U.S. 110 (1919), cited by petitioner for the proposition that "the Court . . . had to conclude that the challenged statute would work no unconstitutional taking,

party and had not consented to suit. As the Court declared, "[i]f injury was occasioned . . . by the use made by Congress of its power, relief must be sought by an appeal to that body for redress and not to the courts." 187 U.S. at 568. In 1903, of course, no court had jurisdiction to hear and determine Indian tribal claims, including taking cases. (*See* pp. 19-20, *supra.*)

The relationship between Congress' ability under *Lone Wolf* to abrogate a treaty provision and the duty of the United States to pay just compensation where such abrogation disposes of Indian recognized title lands for less than their fair market value was specifically addressed by the Court in *Shoshone Tribe* v. *United States, supra:*

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways and at times even in derogation of the provisions of a treaty. Lone Wolf v. Hitchcock, 187 U.S. 553, 564-566, 23 S. Ct. 216, 47 L. Ed. 299. *The power does not extend so far as to enable the Government "to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation . . .; for that 'would not be an exercise of guardianship, but an act of confiscation.'"*

(299 U.S. at 497-98; citations omitted; emphasis supplied.) With the exception of *Cherokee Nation* v. *Southern Kansas R. Co., supra,*[41] all of the previously

else an injunction would have issued" (Govt. Br. 54, n.45), is not in point. The Court in *Lane* enjoined unauthorized Executive action, not the implementation of an act of Congress. *See also, United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 509-10 (1913).

[41] *See* p. 41, n.29, *supra.* The passage from *Cherokee Nation* to the effect that Indian tribal lands may not be taken "without just compensation being made to the owner" (135 U.S. at 657), was cited favorably in conjunction with *Lone Wolf* by the Court in *Federal Power Commission* v. *Tuscarora Indian Nation,* 362 U.S. 99, 121-23 (1960).

discussed just compensation cases involving treaty-protected reservation lands arose after *Lone Wolf,* yet none construed its language as the Government here urges.[42] In the words of the court below: "In the *Lone Wolf* case, the Supreme Court was not required to, and did not, decide the legal issue whether, as a result of the 1900 statute, the Indians were entitled to recover just compensation for a fifth amendment taking." (Pet. App. 30a.)

One remaining aspect of *Lone Wolf*—while no longer good law—requires brief mention in order further to show the inapplicability of that decision to the present case. *Lone Wolf* was based primarily upon an interpretation of Congress' power as "a political one, not subject to be controlled by the judicial department of the government." 187 U.S. at 565. The political ques-

[42] In a later suit before the Indian Claims Commission, the tribal plaintiffs recovered a judgment against the United States for the difference between the amount paid for land under the 1900 Kiowa statute at issue in *Lone Wolf* and what the land at the time actually was worth. *See Kiowa, Comanche and Apache Tribes* v. *United States,* 4 Ind. Cl. Comm. 95 (1955). The Government here points out that no interest was awarded on the principal amount in that case (Govt. Br. 55, n.45), thus implying that the question of whether a Fifth Amendment taking was involved had been litigated and lost. The truth is different, for, as the Court of Claims carefully elucidated in its opinion on the *Kiowa* appeal, "we think that the issue regarding the allowability of interest is not actually before the court in this appeal [because the] petition of the Indians before the Indian Claims Commission does not state a claim arising under the Constitution * * *." *Kiowa, Comanche and Apache Tribes* v. *United States,* 143 Ct. Cl. 534, 544, 163 F. Supp. 603, 610 (1958), *cert. denied,* 359 U.S. 934 (1959).

tion doctrine has been narrowed in recent years. *See Baker* v. *Carr,* 369 U.S. 186 (1962); *United States* v. *Nixon,* 418 U.S. 683 (1974). Moreover, the concept that Indian legislation is immune from judicial scrutiny was expressly repudiated by this Court in *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73 (1977):

> The statement in Lone Wolf, supra . . ., that the power of Congress "has always been deemed a political one, not subject to be controlled by the judicial department of the government," however pertinent to the question then before the Court of congressional power to abrogate treaties [citation omitted], has not deterred this Court, particularly in this day, from scrutinizing Indian legislation to determine whether it violates the equal protection component of the Fifth Amendment. See, e.g., Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute."

(430 U.S. at 84; citations omitted.) The currency of the Indian political question concept in 1903 and its rejection today demonstrate additionally why *Lone Wolf* cannot be treated as authority for the Government's argument that "legislation disposing of tribal property for the benefit of the tribe" is beyond the reach of the Fifth Amendment.

To conclude, nothing in this Court's holding in *Lone Wolf* v. *Hitchcock, supra,* relieves the United States of its constitutional obligation to pay the Sioux just compensation for the taking of their lands and rights under the Act of February 28, 1877, *supra.*

II. The 1877 Act Effected a Taking of the Black Hills Country for Which the Sioux Are Entitled to Just Compensation Even Under the More Stringent "Good Faith Effort" Test for Fifth Amendment Violations Invoked by the Court Below.

A. Introduction

For years after this Court's decision in *Shoshone Tribe* v. *United States, supra,* the Court of Claims adhered faithfully to the principle that under the Fifth Amendment the United States must pay full value when treaty-protected Indian lands are taken—fair market value as of the date of taking plus interest as a measure of just compensation until the date of payment.[43] In 1968, however, the court below abandoned that eminently sensible rule. Perceiving a need for reconciling the plenary power of Congress to break treaties, reflected in *Lone Wolf* v. *Hitchcock, supra,* with the constitutional obligation of the United States to pay just compensation for the taking of tribal reservation lands, as determined in *Klamath, Shoshone Tribe* and *Creek Nation, supra,* the Court of Claims created a "good faith effort" test for Fifth Amendment claims in Indian litigation. In the lead case of *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States,* 182 Ct. Cl. 543, 390 F.2d 686 (1968), the court below concluded:

> . . . it is the good faith effort on the part of Congress to give the Indians the full value of their

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[43] *E.g., Navajo Tribe* v. *United States,* 176 Ct. Cl. 502, 545-46, 364 F.2d 320, 345-46 (1966); *Sioux Tribe* v. *United States,* 161 Ct. Cl. 413, 315 F.2d 378 (1963); *Miami Tribe of Okla.* v. *United States,* 150 Ct. Cl. 725, 742-44, 281 F.2d 202, 212-13 (1960), *cert. denied,* 366 U.S. 924 (1961); *Uintah and White River Bands of Ute Indians* v. *United States,* 139 Ct. Cl. 1, 152 F. Supp. 953 (1957); *Rogue River Tribe of Indians* v. *United States,* 105 Ct. Cl. 495, 547-48 (1946); *Nez Perce Tribe* v. *United States,* 95 Ct. Cl. 1, 6-8, 11 (1941).

> land that identifies the exercise by Congress of its plenary authority to manage the property of its Indian wards for their benefit. Without that effort, Congress would be exercising its power of eminent domain by giving or selling Indian land to others, by dealing with it as its own, or by any other act constituting a taking.

182 Ct. Cl. at 557, 390 F.2d at 693; *see also Klamath and Modoc Tribes* v. *United States,* 193 Ct. Cl. 670, 684-85, 436 F.2d 1008, 1015 (1971). The majority of the Court of Claims, as well as Judge Nichols in his concurring opinion, invoked the above-described good faith effort test as the controlling precedent for determining whether a taking had occurred in this case. (Pet. App. 9a-12a, 39a-48a.)

This Court never has considered or approved the good faith effort test. The Sioux submit that the lower court's test improperly departs from the command of *Shoshone Tribe* and related decisions of this Court, impermissibly treating Indian tribes differently from non-tribal property owners (*see* pp. 41-45, *supra*), and is ill-conceived, unnecessary and erroneous. Nonetheless, even applying the good faith effort test—which is more favorable to the Government than the standard provided in all non-tribal eminent domain cases—the Court of Claims held that the Act of February 28, 1877, *supra,* effected a taking of the Sioux Black Hills country in violation of the Fifth Amendment.

In so ruling, the court below explained that its good faith effort test contemplates "an objective inquiry into the nature and purpose of the congressional action, not an attempt to determine the subjective motive of the legislature in taking that action." (Pet. App. 11a; *see* p. 30, *supra.*) As the court further stated,

"[t]he critical inquiry is what Congress did—and how it viewed the obligation it was assuming—at the time it acquired the land. . . ." [44] (Pet. App. 28a.) To ascertain such facts, the Court of Claims relied upon the "Acts of Congress, congressional committee reports, statements submitted to Congress by government officials, reports of special commissions appointed by Congress to treat with the Indians, and similar evidence relating to the acquisition." (*Id.* at 11a.) Based upon

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[44] This formulation of the good faith effort test is even more favorable to the United States than the standard originally promulgated and heretofore applied by the court below. In *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* for example, the court found that no Fifth Amendment taking had occurred with respect to "homestead lands," where the Indians were to receive the purchase price paid by non-Indians, because Congress had appointed a special commission "to classify and appraise the land" and there was "no evidence or suggestion that the commission did not act in perfect good faith and do its best to find reasonable prices." 182 Ct. Cl. at 557; 390 F.2d at 694. In the same case, on the other hand, the court found that a Fifth Amendment taking of tribal property had occurred with respect to "school lands" turned over to the State because "Congress simply said the land was worth $2.50 per acre, but made no effort to determine whether that was what the land was truly worth." 182 Ct. Cl. at 559, 390 F.2d at 694-95. Similarly, in *Confederated Salish and Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 437 F.2d 458 (1971), the court below found a taking in violation of the Fifth Amendment, where Congress had appropriated $30,000 to pay for 18,523 acres of tribal land set aside as a "permanent national bison range," because, in acquiring such property "for 'just the figure Congress wanted to pay', defendant 'was exercising its power of eminent doman * * *'." 193 Ct. Cl. at 814, 437 F.2d at 465. In short, until this case the Court of Claims insisted that Congress provide for an objective appraisal of the Indians' lands in order to satisfy the good faith effort test (*see Klamath and Modoc Tribes* v. *United States, supra,* 193 Ct. Cl. at 687, 436 F.2d at 1016), and how Congress "viewed the obligation it was assuming" did not constitute sufficient compliance.

a thorough analysis of these legislative materials (*id.* at 12a-26a), the court concluded that the background of the 1877 Act "did not reflect or show any considered judgment by Congress that it was paying a fair price" for the Black Hills (*id.* at 25a), and thus that the statute resulted in a Fifth Amendment taking.

The following discussion is intended to demonstrate that the Court of Claims was right, assuming, *arguendo,* that the good faith effort test is valid.

B. The Grant Administration's conduct towards the Sioux through passage of the 1877 Act constitutes the rankest case of dishonorable dealings in our nation's history.

The sordid story of the Government's treatment of the Sioux during the period leading up to the taking of the Black Hills country pursuant to the Act of February 28, 1877, *supra,* has been set forth in detail in respondents' background statement. In order to place the issue of "good faith" in proper factual context, a brief summary of that activity follows:

1. Under the Treaty of April 29, 1968, *supra,* the United States promised the Sioux that the Great Sioux Reservation was set aside for their exclusive use and occupancy, that non-Indians would be barred from the reservation, and that no cession of any portion of the reservation would be valid without the written consent of three-quarters of the adult male Indians. In less than ten years, the Government broke each of these promises. (Pp. 6-8, *supra.*)

2. During the summer of 1874, the Grant Administration sent an expedition under the command of Lt. Col. Custer into the Black Hills to

report upon its mineralization, the Custer expedition not only discovered but also widely publicized the gold deposits there, and the Government thus stimulated an illegal invasion of the Great Sioux Reservation by white miners and settlers. (Pp. 8-9, *supra.*)

3. Seizing upon the presence of the miners as an excuse, the Grant Administration early in 1875 began to pressure the Sioux to sell the Black Hills. The Allison Commission, appointed by the Secretary of the Interior to negotiate with the Sioux for such a cession, however, could not reach an agreement because, in the words of the later Manypenny Commission, "they had no authority to offer them [the Sioux] any sum which would be a just equivalent for their right in the Black Hills, or which gave to the Indians hopes for the future." (Pp. 9-12, *supra.*)

4. Frustrated by the Sioux' refusal voluntarily to sell the Black Hills and relinquish their off-reservation rights, President Grant in November 1875 secretly ordered the Army to evacuate the Black Hills area and cease opposition to the miners, thus inviting a further invasion of the Great Sioux Reservation in violation of Article 2 of the 1868 Treaty. At the same time, the Secretary of the Interior and the Commissioner of Indian Affairs urged Congress to terminate essential appropriations for Sioux subsistence until the Sioux agreed to give up their gold country. (Pp. 12-13, *supra.*)

5. To exert further pressure upon respondents, the Secretary of the Interior in December 1875 di-

rected the Sioux, who were peacefully and lawfully hunting west of the Great Sioux Reservation in accordance with Article 16 of the 1868 Treaty, to return to the reservation by January 31, 1876, or face military punishment. Although the severe winter weather prevented the Indians from meeting this deadline, the Secretary notified the Secretary of War on February 1, 1876, that the Sioux had failed to comply with his order and were being turned over to the Army for appropriate action. (Pp. 14-15, *supra.*)

6. The Army commenced a war of attrition against Sioux men, women and children during the spring of 1876. Following Custer's defeat at Little Big Horn, Congress approved a rider to the 1876 Indian Appropriations Act which cut off all future rations even for peaceful Sioux bands unless the Indians first agreed to cede the Black Hills, to relinquish their off-reservation hunting rights and to grant three right-of-ways through the Great Sioux Reservation. In substance, Congress adopted the Grant Administration's recommendation that the Sioux be made to sell or starve. (Pp. 15-16, *supra.*)

7. The Manypenny Commission, appointed by the President to negotiate with the Sioux, met with respondents during the autumn of 1876. By this time, the bulk of the Sioux had been disarmed, dismounted and confined within the Great Sioux Reservation, and made wholly dependent upon the United States for their subsistence. Notwithstanding their helpless condition and the ultimatum contained in the 1876 Act, less than 10% of the adult male Sioux consented to the Black Hills cession

agreement proposed by the Commission, which thus did not meet the requirement in Article 12 of the 1868 Treaty for a 75% affirmative vote. The Manypenny Commission, though, submitted the purported agreement to the President, who in turn submitted it to Congress as if it were valid. (Pp. 16-17, *supra.*)

As the Court of Claims has declared, "the duplicity of President Grant's course and the duress practiced upon the starving Sioux, speak for themselves. A more ripe and rank case of dishonorable dealings will never, in all probability, be found in our history * * *." *United States* v. *Sioux Nation,* 207 Ct. Cl. 234, 241, 518 F.2d 1298, 1302 (1975) (A. 261). Certainly the Government cannot point to the foregoing record as evidence that the Grant Administration demonstrated any discernible "good faith" in its dealings with the Sioux Nation.

In order to blunt this conclusion and show an alleged congressional good faith effort to compensate the Sioux, petitioner repeatedly refers to statements made in 1875 by President Grant, Commissioner of Indian Affairs Smith and the Allison Commission to the effect that respondents should be paid "a fair and full equivalent" for the Black Hills. (Govt. Br. 15-16, 18, 23, 64.) At the time these statements were made, however, the individuals involved had no factual basis for determining what a "full equivalent" for the Sioux land might be, since the Black Hills country had not then been scientifically investigated or appraised. (*See* p. 12, *supra.*) Moreover, their proposals later were rejected by Congress.

Commissioner Smith, for example, recommended that a *portion* of the Government's payment for the Black Hills "should be made to take the place of the free rations now granted" (A. 151), whereas the 1877 Act provided that rations shall be the entire "consideration" for the Black Hills gold fields, plus respondents' rights under Articles 11 and 16 of the 1868 Treaty and three right-of-ways through the Great Sioux Reservation. Similarly, the Allison Commission urged the creation of a fund out of the proceeds paid to the Indians for the Black Hills, a portion of which might be used for subsistence (A. 193-94), while President Grant never mentioned rations, suggesting to the Sioux instead that their money ("full equivalent in value") for the Black Hills "be paid out in U.S. bonds and deposited here [in Washington], so that the interest would be drawn twice a year for your benefit, and expended for your benefit each year as might be agreed upon. . . ." (A. 214.) Congress never discussed establishment of any such fund for the Sioux and the 1877 Act incorporated neither of these executive proposals.

In light of the entire record, therefore, as contrasted with petitioner's selected phrases out of context, Congress may not be said on the basis of 1875 statements by President Grant, the Allison Commission or Commissioner Smith to have exerted a good faith effort in 1877 to provide the Sioux a fair equivalent for their property.

C. The legislative histories of the 1876 Act and the 1877 Act show that Congress did not make a good faith effort to pay the Sioux full value for the Black Hills country.

The court below carefully examined the legislative background of the Act of February 28, 1877, *supra,* to

determine whether Congress then undertook in good faith to furnish the Sioux a full equivalent for the Black Hills and found no such evidence. (Pet. App. 12a-28a.) In short, the court found that Congress did not even discuss the value of the property being acquired from respondents by the United States or what compensation was being paid for the land, much less whether the compensation was fair or adequate. (*Id.* at 24a.) In order to demonstrate the indubitable accuracy of the Court of Claims' conclusion, the legislative record is here discussed in detail.

1. *Legislative History of the 1876 Act:* The legislative antecedent of the 1877 Act was the Indian Appropriations Act of August 15, 1876, *supra,* and the legislative antecedent of the "sell or starve" Sioux rider to the 1876 Appropriations Act was S. 590, 44th Cong., 1st Sess., a bill "providing for an agreement with the Sioux Nation in regard to a portion of their reservation. . . ." (Pet. App. 18a; A. 328-8b.) As reported by the Senate Committee on Indian Affairs on March 15, 1876, S. 590 provided for a commission to negotiate with the Sioux for a cession of the Black Hills, in return for which the United States would provide the Indians with subsistence for not more than ten years; the bill further provided that, unless the Sioux agreed to a cession by July 1, 1877 (more than a year later), appropriations for subsistence would be terminated. (*Ibid.*) The bill was the subject of extensive debate in the Senate on March 20 and 21, but then was temporarily set aside. 4 CONG. REC. 1796-1801, 1829-30, 2177. Debate on S. 590 resumed in the Senate on June 3, 1876 (*id.* at 3530 *et seq.*), at which time the bill was amended to eliminate all reference to the termination of subsistence and to provide merely for the appointment of

a commission to negotiate with the Sioux "for the cession to the United States of the rights of said tribe to the country known as the Sioux reservation, Dakota, and territory adjacent or otherwise for the preservation of peace." (*Id.* at 3539; Pet. App. 18a-19a.) As passed by the Senate, therefore, S. 590 was non-coercive.

In the House of Representatives, S. 590 first was referred to the Committee on Indian Affairs (4 CONG. REC. 3743, June 10, 1976) and then was reported by that committee on June 15, 1876. (*Id.* at 3817.) As reported, the bill contained another amendment which permitted the proposed commission to negotiate for the acquisition of a "portion" of the Great Sioux Reservation, or, in other words, the Black Hills. (A. 328e-f.) The bill, however, was sent back to the committee and several later motions to reconsider were defeated. (Pet. App. 19a; 4 CONG. REC. 3817, 4470, 4520.) As considered by the House of Representatives, S. 590 never contained a provision for the termination of existing Federal assistance to the Sioux or any other provision for forcing respondents to sell their lands.

Meanwhile, the House of Representatives on June 2, 1876, began consideration of H.R. 3478, a bill to provide appropriations for the Indian Department, which provided, *inter alia,* that no portion of an appropriation of $1 million for feeding the Sioux "shall be available or be used for that purpose unless the said Indians shall first agree to relinquish all right and claim to any country outside the boundaries of the permanent reservation established by the said treaty for said Indians," *i.e.,* the hunting area and unceded Indian territory reserved by the Sioux under Articles 11 and

16 of the 1868 Treaty, respectively. (Pet. App. 19a; A. 328b-d.) After considerable debate on this portion of the bill (4 CONG. REC. 3503-08, June 2, 1876), which, however, was not then amended, and on other features of the legislation, H.R. 3478 passed the House on June 6, 1876. (*Id.* at 3639.) The House version of H.R. 3478, therefore, called for the termination of rations, but not for a cession of the Black Hills.[45]

The Senate Committee on Appropriations, on the other hand, substantially revised the Sioux portion of H.R. 3478 and that change was ratified in the Senate on June 20, 1876. (*Id.* at 3902.) Specifically, the Senate amendment provided that no sums appropriated for the Sioux "shall be paid to any tribe thereof while said tribe is engaged in hostilities against the white people" and further provided that one-half the current appropriation for Sioux subsistence ($1 million) would be suspended until the Indians agreed not only to relinquishment of their rights outside the Great Sioux Reservation, but also to a cession of the Black Hills. (A. 328d.) The House refused to accept the Senate amendments to H.R. 3478 (4 CONG REC. 4043, June 22, 1876), so successive conference committees were appointed. (*Id.* at 4043, 4057, 4324, 4563, 5463, 5539.) Agreement was not reached until August 14, 1876 (*id.*

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[45] Petitioner argues that H.R. 3478, as passed by the House, "did not address the Black Hills question evidently because S. 590 was already pending in the House." (Govt. Br. 27, n.19.) This assertion is rank speculation, admittedly unsupported by a scintilla of evidence in the record, and seems patently untrue in view of the fact that the House considered H.R. 3478 on June 2 or almost two weeks before it considered S. 590 (June 15). In light of the House committee's action on S. 590, a more logical assumption would be that the House of Representatives at the beginning of June was not yet in a mood to force the Sioux into a Black Hills land cession.

at 5596), more than a month after news of the Army's defeat at Little Big Horn had arrived in Washington.[46] As previously stated (p. 15, *supra*), Congress approved the legislation with a proviso that no future appropriations would be made for Sioux subsistence unless the Indians first agreed to give up their off-reservation rights under Articles 11, 15 and 16 of the 1968 Treaty, to sell the Black Hills portion of the Great Sioux Reservation and to grant right-of-ways through the remainder of the reservation.

Petitioner challenges the Court of Claims' suggestion that the conference committee toughened the Sioux rider to the Indian Appropriations Act of August 15, 1876, *supra,* in response to Custer's defeat, arguing that this difference between the House and Senate versions of H.R. 3478 had been reconciled by July 1, 1876. (Govt. Br. 28, 30.) The record, however, does not show, and there is no way now of learning, what the conferees might have agreed upon with respect to the Sioux rider before the outcome at Little Big Horn on June 25 became known in Washington. What the record does show is that the conference committees met on a number of occasions after Custer's death was confirmed and that the conferees thus had ample opportunity to revise the Sioux rider. What is also known is that the bill which emerged from the conference committee on August 14, and which became the 1876 Act, was far more coercive and harsher upon the

[46] Petitioner concedes that news of Custer's death reached Washington on July 5, 1876, but claims that two days later Congress still did not know the accuracy of this report. (Govt. Br. 30.) Congress obviously did know its accuracy well before July 15, 1876, when the House of Representatives considered H.R. 3894, a bill for the relief of Elizabeth Custer, widow of George A. Custer. 4 CONG. REC. 4627-28.

Sioux than the Senate version of S. 590, approved June 3, 1876, and the House version of H.R. 3478, approved June 6, 1876.[47] The court below, therefore, had sound grounds for concluding that congressional outrage over a military debacle led directly to a legislative ultimatum.

For purposes of this litigation, however, whether the final text of the Sioux rider reflected a reaction to Custer's defeat, or stemmed from a more generalized congressional frustration over the costs of an Indian war and the unwillingness of the Sioux voluntarily to cede the Black Hills, is not significant. The critical element in the legislative history of the 1876 Act is the fact that, in all of the debate over S. 590 and H.R. 3478, not one member of Congress ever mentioned, much less discussed, the value of the Black Hills[48] or whether

[47] Petitioner also argues that the 1876 Act was "more generous [sic]" than the Senate version of H.R. 3478. (Govt. Br. 28.) In this regard, however, the minor language change to which the Government pointedly refers—*i.e.*, "tribe" to "band"—was not substantive in content, but a mere technical amendment to characterize the Sioux "tribes" we know today as "bands", which is what they were called in both the 1868 Treaty and the 1877 Act. In addition, whether cutting off 50% of the Sioux rations for one year is more or less harsh than cutting off 100% of the Sioux rations in all subsequent years is a debatable and, for purposes of this case, irrelevant question.

[48] *See* p. 74, n.52, *infra*. As previously noted (p. 10, n.8, *supra*), Walter P. Jenney, on instructions from President Grant, conducted a topographical and geological survey of the Black Hills during the summer of 1875. (A. 310.) Petitioner observes that the Jenney report was transmitted to the Senate on April 21, 1876 (Govt. Br. 26, n.18), and attempts to imply that Congress considered that report in arriving at an "equivalent" for the Black Hills. (*Id.* at 64.) This thesis has absolutely no merit. First, the Jenney report could not form a base for calculating a value equivalent because, as the Government concedes, the report did not

subsistence would be a reasonable substitute for the Sioux Nation's property.[49] As the Court of Claims found, "[t]here is no indication that Congress believed that, or even considered whether, the obligation it assumed to furnish the Sioux with rations until they could support themselves, constituted the fair equiva-

specify "even an approximation of the worth of the Black Hills. . . ." (*Id.* at 16.) Second, the Jenney report is not mentioned once in the legislative histories of the 1876 Act and the 1877 Act. Lastly, as the Indian Claims Commission concluded, Jenney could not have furnished an accurate valuation for the Black Hills gold, since the greatest mineral wealth there came from quartz (lode gold) deposits, the expedition did not carry equipment for testing quartz deposits and the expedition did not enter the northern part of the Black Hills, site of the Homestake Mine, where the more extensive quartz lodes were discovered. (A. 310, n.3.)

[49] A significant colloquy during the Senate debate on the Appropriations Committee amendment to H.R. 3478 clearly establishes that Congress did not perceive Sioux rations as consideration for relinquishment of the Black Hills. Senator Kernan of New York there asked whether the appropriation of $1 million for subsistence of the Sioux "is a pure gratuity for which we require them to give us some of their land until they give us grants of right of way, or whether it is money that we are to appropriate anyhow to make them give up the Black Hills country, as it is called, and grant rights of way, or whether we are making a new agreement to be binding by an act of Congress." 4 CONG REC. 3902 (June 20, 1876). To this question, Senator Windom, floor manager of the bill, responded:

> "It is a fact, I will say to the Senator from New York, that the $1,000,000 appropriated is a pure gratuity. We are under no treaty obligation to grant it. But it is not only a gratuity but a necessity, I suppose. The committee have thought that if we were compelled to grant this large amount of money for their subsistence, they should be required to relinquish this outside territory, a small portion, comparatively, of their reservation. *We make this gratuity on the condition of that relinquishment, hoping it will preserve the peace in that country.*"

(*Ibid;* emphasis supplied.)

lent of the value of the lands the United States was acquiring from them." (Pet. App. 26a.)

2. *Legislative History of the 1877 Act:* In accordance with the Act of August 15, 1876, *supra,* the President appointed a commission, headed by George W. Manypenny, to negotiate an agreement calling for "certain concessions from the Sioux. . . ." (Pet. App. 19a-20a.) The instructions to the Manypenny Commission, referring to the Sioux rider in the Appropriations Act, stated that "the Indians should be made to understand distinctly that they can hope for continued appropriations only by full submission to the authority and wishes of the Government. . . ." (*Ibid.*) The Manypenny Commission's report observed that the commissioners "accepted the trust confided to them under the grave responsibility that if they failed in their mission the twenty thousand friendly Indians at the agencies must either starve or join the hostile Indians" (*ibid*), but also that we "submitted to the Indians the conditions required by Congress, and stated that we had no authority to change them in any particular." (*Id.* at 20a; *see* pp. 16-17, *supra.*) As the Court of Claims found, though, nowhere in its report did the Manypenny Commission indicate "that it believed the provisions for rations constituted a fair equivalent for the value of the Black Hills lands the Indians were surrendering." (Pet. App. 22a-23a.)

President Grant submitted the Manypenny Commission report to Congress, together with an "agreement", executed by less than 10% of the adult male Sioux, which provided for the cessions specified in the 1876 Act, but violated Article 12 of the 1868 Treaty. On January 26, 1877, the Senate Committee on Indian

Affairs reported S. 1185, a bill to "ratify and confirm" the purported Sioux agreement. 5 CONG. REC. 983. The Senate passed the bill the next day. The Senate debate was concerned almost exclusively with the possible removal of the Sioux from their South Dakota reservation to Indian Territory, a provision in the agreement which the Senate Committee had deleted. (*Id.* at 1055-58; Pet. App. 23a.) The sole references to the Black Hills during this discussion were Senator Allison's comment that "[i]t is an imperative necessity that so much of this agreement as provides for the relinquishment of that vast area of territory which lies west of this boundary should be at once placed in the possession and under the control of the Government of the United States . . ." (5 CONG. REC. 1057), and his additional description of the Black Hills area as "valuable lands, made valuable by the discovery of mineral products there. . . ." (*Id.* at 1058.)

The House of Representatives passed S. 1185 less than three weeks later on February 15, 1877. (*Id.* at 1617.) As in the Senate, the House debate dealt almost entirely with the possible removal of the Sioux to Indian Territory. (*Id.* at 1615-17; Pet. App. 23a.) Three Congressmen—Seelye, Boone and Crounse—spoke of the great importance of the bill and the necessity for speedy passage so that the laws of Dakota Territory could be extended into the existing Black Hills mining settlements. (5 CONG. REC. 1615-16.) Congressman Boone further remarked:

> The Black Hills country is to the people of the United States a valuable country. This agreement concedes the Black Hills territory to the Government of the United States, in consideration of which we make provision for feeding these Indians upon the Missouri River at points contiguous to the means of transportation, *so that there will be a saving to the Government in feeding the Indians, in addition to the transfer of this valuable country to the United States.*[50]

(*Id.* at 1615; emphasis supplied.) No further reference was made to the Black Hills. In short, as the Court of Claims determined, there was in Congress a complete "lack of any discussion of whether the 'consideration' provided by the United States was adequate consideration for the lands surrendered. . . ." (Pet. App. 24a.)

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[50] Congressman Boone mistakenly believed that, after implementation of the 1877 Act, the Sioux would "be placed on a part of the reservation which they now hold which is susceptible of cultivation. . . ." 5 CONG. REC. 1615. To the contrary, as the Allison Commission said of the Great Sioux Reservation outside the Black Hills:

> Our observation leads us to the conclusion that the character of this region is such that farming operations are impracticable, even when conducted by those familiar with the best methods. Small tracts could be made productive by means of expensive irrigation, but the volume of water is not sufficient to irrigate on an extensive scale, even if the country were suitable.

(A. 178.) In its conclusion, the Allison Commission reiterated with respect to the Sioux: "Their reservation, extending over an area as large as New England, is, for the most part, unsuited to agriculture." (A. 194.) At a later point in the House debate on S. 1185, Congressman Seelye advised his colleagues:

> Their removal is an absolute necessity. These Indians are now where even the most cultivated white man could not obtain a living with all his knowledge of agriculture.

5 CONG. REC. 1617 (February 15, 1877). Indeed, the notorious unsuitability of the Great Sioux Reservation for agriculture is exactly the reason the Manypenny Commission sought removal of the Sioux to the Indian Territory. (A. 106-7.)

D. The 1877 Act did not provide the Sioux a fair and full equivalent for the property acquired by the United States.

In analyzing the Act of February 28, 1877, *supra,* the Court of Claims observed that "an essential element of the inquiry . . . is determining the adequacy of the consideration the Government gave for the Indian lands it acquired."[51] (Pet. App. 11a-12a.) The few prior decisions of the court below concerning the good faith effort test have stressed that the procedure Congress establishes for fixing the amount of the payment is significant in deciding whether the Government actually intended fully to compensate the Indians for the taken lands. Thus, where Congress provided for a competent and impartial appraisal of the lands to be disposed of, the court below has held that Congress made a good faith effort to furnish fair value. *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* 182 Ct. Cl. at 557-58, 390 F.2d at 693-94; *Klamath and Modoc Tribes* v. *United States, supra,* 193 Ct. Cl. at 687, 436 F.2d at 1016. Where Congress, on the other hand, has set the amount of compensation arbitarily or for some apparent reason other than providing fair value to the Indians, the court below has ruled that no good faith effort

[51]While the Government argues that the mere recital in the 1877 Act that rations were "consideration" forecloses any examination into whether the consideration was adequate (Govt. Br. 63), the court below correctly analyzed the value of the consideration promised, together with the factual background and legislative history of the statute. As the court observed, "[t]hat inquiry cannot be avoided by the government's simple assertion that it acted in good faith in its dealings with the Indians." (Pet. App. 12a.) The determination of just compensation is a judicial function. *Seaboard Air Line R. Co.* v. *United States,* 261 U.S. *supra* at 304; *Monongahela Navigation Co.* v. *United States,* 148 U.S. *supra* at 327.

was made and thus a taking occurred. *Three Affiliated Tribes of Fort Berthold Reservation* v. *United States, supra,* 182 Ct. Cl. at 559, 390 F.2d at 693; *Confederated Salish and Kootenai Tribes* v. *United States,* 193 Ct. Cl. 801, 814, 437 F.2d 458, 465 (1971).

If the good faith effort test, as initially promulgated and heretofore applied by the Court of Claims, were here invoked, further inquiry into the question whether the 1877 Act constituted an exercise of the Government's eminent domain power would be unnecessary. (*See* p. 57, n.44, *supra.*) Congress did not provide for an objective appraisal of the Black Hills and the compensation promised was arbitrarily fixed by Congress, not the result of "meaningful negotiation or arm's-length bargaining". (Pet. App. 25a.) The conclusion inexorably follows under the original good faith test that the 1877 Act effected a Fifth Amendment taking of Sioux lands and rights. In this case, however, in reaching the same final decision, the court below bent over backwards to favor the Government by looking into the question of how Congress "viewed the obligation it was assuming" (*id.* at 28a) or, more particularly, whether some ascertainable relationship existed, and was known to Congress, between the value of the "consideration" and the value of the property acquired by the United States.

In its extensive analysis of the "consideration" provided under the 1877 Act, the Court of Claims observed that "the requirement to furnish them with rations until they become self-sufficient" was "[t]he only item of 'consideration' that possibly could be viewed as showing an attempt by Congress to give the Sioux the 'full value' of land." (Pet. App. 21a.) As has

already been shown (pp. 62-71, *supra*), the record contains no evidence that Congress, in approving the 1876 and 1877 Acts, believed that, or even considered whether, the obligation it was assuming to furnish subsistence to respondents represented a fair and full equivalent for the value of the Black Hills. As has also been demonstrated heretofore (pp. 45-50, *supra*), the Government's conditional promise to provide an indeterminate number of Sioux with rations for an indefinite period did not in fact constitute just compensation.

Petitioner does not seriously dispute the foregoing points.[52] Instead, the Government attempts retrospectively to construct a good faith effort on the part of Congress to pay the Sioux full value for their property by arguing: (1) that the United States has spent $43 million for Sioux subsistence since 1877 and thus more than the lands and rights taken were worth; (2) that 900,000 acres added to the Great Sioux Reservation under the 1877 Act were part of the consideration for the Black Hills; and (3) that the court below incorrectly placed the burden of proving congressional "good faith" upon the United States. None of these arguments is valid.

1. *Government expenditures pursuant to the 1877 Act*: Petitioner's attempt to find refuge in the claimed expenditure of $43 million for Sioux subsistence dur-

[52] In the legislative histories of the 1876 and 1877 Acts, petitioner managed to locate one reference, which it twice cites, in the March 15, 1876 version of S. 590 to paying the Sioux "a proper equivalent for the use and occupation of the Hills by the whites. . . ." (Govt. Br. 24, 64; *see* A. 328.) Aside from the obvious vagueness of the reference, petitioner neglects to tell the Court that the quoted words were stricken from S. 590 by the Senate on June 3, 1876. 4 CONG. REC. 3539; *see* A. 328e.

ing a 74-year period up to June 30, 1951, is wholly irrelevant. The issue of whether the 1877 Act effected a taking under the Fifth Amendment turns upon what Congress did in 1877, not upon unforeseen and unforeseeable events which occurred 20, 40 or 70 years afterwards. (Pet App. 28a.) What Congress did in 1877 was to forego any payment to the Sioux at the time their land and rights were acquired by the United States. The Government merely promised to furnish rations until such indeterminate time as the Sioux could support themselves. In addition, the right of the Indians to receive rations was qualified by provisions that food would not be supplied to children between the ages of 6 and 14 who did not regularly attend a government school or to adults (and their families) who lived upon land suitable for cultivation but did not "labor." Just compensation is not such a conditional promise, but rather requires an exact and full equivalent for the fair market value of the land.

In any event, the Government's claim to have expended $43 million[53] for Sioux rations under the 1877

[53] On one occasion, petitioner claims that "the United States . . , pursuant to the 1877 Act, appropriated over $57 million in material assistance betwen 1877 and 1951." (Govt. Br. 36.) This larger figure of $57 million for alleged expenditures on Sioux subsistence is based upon a concession of former Sioux counsel at an early stage in these proceedings. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 at n.2 (Ct. Cl. 1956). As the Court of Claims later observed, former counsel's theory of the case was "improper" (A. 260), and the court below vacated its judgment of affirmance on new Sioux counsel's motion that respondents had not been represented adequately, as evidenced, *inter alia*, by the foregoing erroneous concession of fact by their predecessor. 182 Ct. Cl. 912 (1968); see pp. 20-21, *supra*, and *Sioux Tribe* v. *United States*, 205 Ct. Cl. 148, 182-83, 500 F.2d 458, 476 (1974). Former counsel's concession as to the amount spent by the Government for rations thus was invalidated more than 20 years ago. (*See* A.

Act is unsubstantiated, and, as the court below correctly observed, "[t]he parties disagree over the precise amount of those expenditures." (Pet. App. 9a.) The genesis of petitioner's figure is a finding by the Court of Claims in *Sioux Tribe* v. *United States,* 97 Ct. Cl. 613, 655-56 (1942) (A. 234). As respondents heretofore have pointed out (p. 6, *supra*), the Act of March 13, 1978, *supra,* provides that the Sioux Black Hills claim shall be determined "without regard to the defense of res judicata or collateral estoppel. . . ." For purposes of this case, therefore, the 1942 finding of the Court of Claims is a nullity.[54]

Petitioner will argue, presumably, that the General Accounting Office report upon which the 1942 finding of the court below was based is part of the record in this case. (*See* Govt. Br. 36, n.25.) The Commission, however, properly rejected such evidence[55] and ordered

260, 265; *see also* Govt. Br. 42 at n.33.) For petitioner now to attempt to resurrect that concession, as if it had some legitimate status before the Court, is shocking.

[54] Even in the absence of the 1978 Act, the recitation of the Court of Claims in *Sioux Tribe* would not have possessed evidentiary value or been binding upon the parties in these proceedings, since, as the Indian Claims Commission determined, the issue of "consideration" was not litigated in 1942. (A. 287-88.)

[55] The Commission's rationale for refusing to give any credence to the Government's accounting reports is obvious. The General Accounting Office merely listed gross appropriations under a label, "1877 Act." The reports do not show: (a) whether the appropriations in fact were spent for Sioux rations; (b) whether such rations as the United States purchased in fact were delivered—an eminently logical question given the Manypenny Commission's vivid description of short-weighting in the distribution of beef to the Sioux (A. 116-17); (c) whether the rations were diverted or used by government personnel; (d) whether the rations were delivered to children between the ages of six and fourteen who were not attending school (and thus not entitled to subsistence under

the Government to prepare a new accounting report. (A. 292.) The United States never appealed from that ruling, but also never followed the Commission's directive to prepare a new statement of claimed expenditures under the 1877 Act, so the record does not contain a shred of competent evidence showing that the United States spent $43 million [56] or any other sum for Sioux rations. Moreover, even if some portion of that amount could be proved, the court below correctly recognized that the subsequent alleged payment to the Sioux of "amounts that in hindsight appear to equal or even exceed the fair value of the property does not make the initial acquisition any the less a fifth amendment taking." (Pet. App. 28a.)

2. *The 900,000 acres*: Petitioner asserts that "the 1877 Act recited that 'in consideration' of the cession of the Black Hills, the United States undertook a number of commitments, including . . . the grant of 900,000 acres of grazing land . . . ." (Govt. Br. 49, 65, 73 at n.58.) A mere reading of the 1877 Act shows this statement to be untrue. Article 5 of the 1877 Act actually recites that, "[i]n consideration of the foregoing cession of territory and rights," the United

the 1877 Act); (e) whether the rations were issued to Indians and their families who lived upon lands suitable for cultivation, but did not labor (who also were not entitled to subsistence); (f) whether the rations were delivered at a time the Sioux were not in compliance with each and every obligation imposed by the 1877 Act; or (g) and most important, whether the expenditures for rations, as listed in the GAO reports, were limited to the items specified in Article 5 of the 1877 Act.

[56] The Government's $43 million figure is, of course, inaccurate on its face, since it contains $3,055,450.53 spent during fiscal years 1875 and 1876, which could not possibly be "consideration" under the 1877 Act. (A. 234; Govt. Br. 36, n.25.)

States agrees to provide certain benefits to respondents, but the addition of 900,000 acres to the Great Sioux Reservation is not among them. The addition of grazing land to the reservation was effected by redefining its boundaries under Article 1, which does not mention "consideration." The plain language of the statute thus dictates that the 900,000 acres to which petitioner refers may not be treated as part of the consideration for the Black Hills country and other Sioux interests acquired by the United States under the 1877 Act.[57] *Tennessee Valley Authority* v. *Hill,* 437 U.S. 153, 194 (1978).[58]

Assuming, *arguendo,* that the value of the 900,000 acres of grazing land added to the Great Sioux Reservation in 1877 were "consideration," the issues in this litigation would remain unaffected.[59] The Court of Claims has established a rule that the Government

[57] Although not "consideration", the United States could have asserted the value of the 900,000 acres as a payment on the claim pursuant to section 2 of the Indian Claims Commission Act, 25 U.S.C. § 70a. The Government, however, waived that right before the Commission in 1976. (*See* pp. 27-28, *supra.*)

[58] Even if the language of the 1877 Act were ambiguous, this Court consistently has held that statutes enacted for the benefit of Indians are to be liberally construed in their favor. *Bryan* v. *Itasca County,* 426 U.S. 373, 381 (1976); *accord, Wilson* v. *Omaha Indian Tribe,* 442 U.S. 653, 99 S.Ct. 2529, 2537 (1979) ("'statutes passed for the benefit of dependent . . . Indian tribes are to be liberally construed'"); *Squire* v. *Capoeman,* 351 U.S. 1, 6 (1956) ("Doubtful expressions are to be resolved in favor of [Indians]."); *Choate* v. *Trapp,* 224 U.S. 665, 675 (1912) ("The construction, instead of being strict, is liberal").

[59] The Court of Claims pointed out, and petitioner here confirms, that the Government did not contend below "that the transfer of this additional land was a significant element of the consideration the United States gave for the Black Hills." (Pet. App. 13a at n.3; Govt. Br. 73 at n.58.)

is entitled to a credit for a land restoration "only to the extent of the purchase price paid by the United States." *Ponca Tribe of Indians of Okla.* v. *United States,* 183 Ct. Cl. 673, 689 (1968). The Indian Claims Commission has determined that the 900,000 acres had a fair market value of $.67 an acre, or $603,000, in 1868 when the Government acquired the land from the Sioux, but the United States actually paid only a tiny fraction of that value. *Sioux Tribe* v. *United States,* 38 Ind. Cl. Comm. 469, 500, 530 (1976) (*see* p. 7, n.5, *supra*). The value of the 900,000 acres thus is *de minimis.*[60]

3. *The burden of proof*: The Government repeatedly complains that the Court of Claims, rather than assuming that Congress deemed its undertaking to provide rations to be "a *fair* consideration" (Govt. Br. 63, emphasis in original; *see* p. 72, n.51, *supra*), in effect "placed the burden of justifying its action on Congress" (*id.* at 45) and "wrongly required of the Congress an affirmative declaration that the undertaking assumed in consideration of the cession of the Black Hills constituted a fair economic equivalent." (*Id.* at 49, 52, 63.) The court below adopted no such approach. The court examined the record objectively to determine what Congress did and what Congress knew, not whether Congress said ritual words or made "affirmative declarations" of a bona fide intent. (*See* pp. 30 and 56-58, *supra.*) The court's ultimate finding of fact that Congress did not make a good faith

[60] Whatever value the 900,000 acres might have also would be more than offset by the value of respondents' rights under Articles 11 and 16 of the 1868 Treaty, not included in the award of the court below, for which the Sioux rejected a Government offer of $500,000 in 1875. (*See* pp. 11 and 23 at n.19, *supra.*)

effort to give the Sioux full value for their property had to be expressed in negative language—*i.e.*, "[n]owhere in the report. . .", "lack of any discussion", "[t]here is no indication that. . .", etc. (Pet. App. 22a, 24a, 26a)—but such statements were based upon evidence of inaction, not any presumption against the United States.

Moreover, no basis exists for petitioner's contention that an Indian tribe must show a lack of a congressional "good faith effort" by "compelling evidence" (Govt. Br. 63) or "overwhelming evidence" (*id.* at 55), and, indeed, the Court of Claims properly could have placed the burden of proof upon the Government here. In other words, the Sioux have demonstrated, and petitioner does not deny, that the land and rights which the United States obtained had a fair market value in 1877 of $17, 553,484. The respondents' having met their burden of proof, logically, under the court's test, the burden would shift to the Government to show that Congress had made a good faith effort to pay that amount or its equivalent.[61]

E. Summary

To summarize, even if the good faith effort test were applicable in this case, the Court of Claims properly concluded that "[t]he terms upon which Congress

[61] Using trust doctrine as an analogy, as petitioner sometimes suggests (Govt. Br. 69-70), the principle is well-settled that the burden of proof is upon the trustee to show that he did not take advantage of his position, particularly where, as here, he has a conflicting interest. *Sheridan* v. *Perpetual Building Assoc.*, 299 F.2d 463, 465 (D.C. Cir. 1962) ("[A]ncient principles require [the trustee] to bear the burden of proving that he has been faithful to [the] trust").

acquired the Black Hills. . .did not reflect or show any considered judgment by Congress that it was paying a fair price." (Pet. App. 25a.) The absence of a good faith effort, of course, does not mean that "Congress was knowingly cheating the Sioux. . . ." (Govt. Br. 67.) The only question is what effort Congress made to pay for the land, not the presence or absence of praiseworthy motives. The concern of this case is with just compensation, not good and evil.

The Government's speculation that some members of Congress may have believed that the best interests of the Sioux would be served by the expropriation of the Black Hills, and by being encouraged to become farmers, is immaterial. What needs to be shown, and what respondents clearly have shown, is that Congress enacted legislation to acquire control over the Black Hills and open that gold-rich country to non-Indian exploitation, and that no identifiable congressional concern was expressed over payment of fair value for the property. Under the good faith effort test, therefore, the 1877 Act effected a taking of Sioux lands and rights in violation of the Fifth Amendment.

III. The United States Is Not Excused From Its Constitutional Obligation to Pay the Sioux Just Compensation for Taking Their Property Even if Congress in the 1877 Act Intended to Promote Their Welfare.

The Government here asks the Court to depart significantly from both (1) the rule established in *Shoshone Tribe* v. *United States, supra,* and other Fifth Amendment cases decided by this Court that Indian tribes are entitled to the same measure of just compensation as non-Indian property owners, and (2) the more strict "good faith effort" rule invoked by the

Court of Claims for testing Fifth Amendment violations. To defeat the Sioux, the Government argues for the first time in any court that the United States need not pay just compensation for the legislative taking of recognized Indian property "if it reasonably can be concluded that the legislation was intended to promote the welfare of the tribe." (Govt. Br. 52.) The Government also argues that the legislation must be presumed to be in the interest of the tribe, that the presumption can yield only to "overwhelming evidence that Congress was not acting as a bona fide guardian" (*id.* at 55) and that any "rational basis" for the taking relieves the Government of the duty to pay just compensation (*id.* at 58).

This extreme position—that Indian tribes, alone among all private property owners, must satisfy special requirements to receive constitutional protection for "property within the meaning of the Fifth Amendment" (*see Shoshone Tribe,* 299 U.S. *supra* at 497)—is particularly ironic because it is based on the Government's trust responsibility to the Indians. The argument has no rational basis, is inconsistent with the controlling decisions of the Court, and should be rejected.

A. The Government's fiduciary duty to Indian tribes does not justify giving treaty-protected tribal property less protection under the Fifth Amendment than other property.

Since the decisions of Chief Justice Marshall in *Cherokee Nation* v. *Georgia,* 30 U.S. (5 Pet.) 1, 16-17 (1831) and *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832), the settled jurisprudence of this Court has been that the United States "has charged itself with moral obligations of the highest responsibility and

trust" in Indian affairs. *Seminole Nation* v. *United States,* 316 U.S. 286, 297 (1942). As the Court observed in *Heckman* v. *United States,* 224 U.S. 413 (1912) at 437:

> Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed. . . .

Thus, the Court often has held the United States to "the most exacting fiduciary standards" and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation* v. *United States,* 316 U.S. *supra* at 296; *United States* v. *Payne,* 264 U.S. 446, 448 (1924). Most recently, the Court held the Government to an "overriding duty to deal fairly with Indians" in *Morton* v. *Ruiz,* 415 U.S. 199, 236 (1974).

Petitioner attempts to avoid the impact of this well-established duty by relegating its application to cases filed under special jurisdictional acts. (Govt. Br. 59-61.) The argument is specious. Neither *Cherokee Nation, Worcester, Heckman, Morton* nor *Payne* was brought under such an act. This Court never has intimated that the Nation's responsibility is so limited. Moreover, as the Court stated in *Shoshone Tribe,* 299 U.S. *supra* at 492-93, rejecting the Government's attempt to read substantive conclusions into a jurisdictional act, "the jurisdictional act * * * merely provides a forum for the adjudication of the claim according to applicable legal principles." *See also United States* v. *Mille Lac Band of Chippewas,* 229 U.S. 498, 500 (1913).

In a further effort to escape its obligation to pay just compensation under the Fifth Amendment, the Gov-

ernment seeks to substitute its fiduciary duty for its constitutional duty, arguing that an award for breach of trust by the United States does not carry interest. (Govt. Br. 61-63.) As previously noted (p. 43, n.32, *supra*), this Court considered and rejected that argument 45 years ago in *United States* v. *Creek Nation, supra.* In *Creek Nation*, the Court specifically held that the power of the United States to control tribal property was "subject to limitations inhering in . . . guardianship *and* pertinent constitutional restrictions" such as the just compensation clause, and awarded interest for a taking. (295 U.S. *supra* at 110; emphasis supplied.) In short, the Government was subject to two proscriptions in the disposition of Sioux lands and rights—its fiduciary duty and the Constitution.

Petitioner would turn the Indian trust doctrine on its head by permitting Congress to acquire tribal property, subject to special federal protection, for a lesser consideration than comparable non-Indian property. Special powers imply special responsibility, not lessened responsibility. At the very least, *Creek Nation* stands for the principle that the United States, in carrying out its fiduciary duty to Indians, must observe no lower standard in dealing with tribal trust property than is invoked with respect to any other private property. Surely, the "limitations inhering in . . . guardianship and pertinent constitutional restrictions" not only prohibit imposing the extraordinary disabilities on tribal reservation lands and rights here urged by the Government, but also require the payment of just compensation to Indians on the same basis as non-Indians. Where Congress pays the Indians less than just compensation for their property, the Government may not be said to be serving in its fiduciary capacity, "for that 'would not be an exercise of guardianship, but an act of confiscation.'" *Shoshone Tribe* v. *United States,* 299 U.S. *supra* at 498.

A similar analysis is applicable to petitioner's argument that the Government was legally justified in expropriating the Black Hills and other Sioux rights for less than fair value because the United States had to provide for the needs and welfare of the Sioux. (Govt. Br. 67-74.) A requirement that just compensation be paid for takings of tribal property does not compromise the Government's power as a trustee by forcing it to become "a very conservative land manager" or by precluding it from reducing the "net worth" of tribe to provide for its welfare. (Govt. Br. 71.) A trustee naturally should be able to sell real property held in trust for such purposes as, for example, paying for the education of the trust beneficiary or meeting other essential needs. For the Government to argue from that premise that the trustee need not obtain full value for his own taking is absurd. A trustee has a duty to sell the property of the beneficiary at the highest market price, not a right to obtain it for less. Assuming, as petitioner asserts, that the Sioux faced "dismal" and "severe economic circumstances" in 1877,[62] their "guardian" made those circumstances far worse by acquiring tribal capital for less than full value. The United States may not claim the attributes of a trustee with respect to the 1877 Act because it was not then acting as a trustee.

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[62] The existence of a claimed crisis, of course, does not repeal the Fifth Amendment, or make a Fifth Amendment taking any less a taking. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952).

B. Because the constitutional power of Congress to enact the 1877 Act is not questioned in this case, the "rational basis" standard of *Morton* v. *Mancari* is irrelevant to the issues before the Court.

Petitioner asserts that "[t]he basic error of the Court of Claims, in our view, was in reversing the usual presumption and requiring the United States to assume the burden of demonstrating that the 1877 Act does not overstep the bounds of congressional power over Indian affairs." (Govt. Br. 52.) That issue is not now and never was in the case. Respondents concede the validity of the 1877 Act—as we must, given *Lone Wolf, The Cherokee Tobacco,* 78 U.S. (11 Wall.) 616, 621 (1871), and like cases confirming congressional "plenary power"—and further acknowledge the underlying constitutional authority of Congress to manage and dispose of Indian property for their best interests. The critical question in this case is whether the United States, having exercised its undoubted power to acquire the Black Hills country and other Sioux rights in land, is required to pay just compensation under the Fifth Amendment for the property taken. Contrary to petitioner's thesis, application of the just compensation clause in no way diminishes congressional power validly exercised under any other provision of the Constitution.[63]

The real issue here presented makes irrelevant whether the Government's disposition of the Black Hills was "tied rationally to the fulfillment of Con-

[63] Congress can, and frequently does, authorize the taking of property belonging to non-Indians under perfectly valid statutes, but the validity of such statutes under the Constitution does not serve to deprive the non-Indian owners of their right to just compensation.

gress' unique obligation toward the Indians." *Morton* v. *Mancari,* 417 U.S. 535, 555 (1974); *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 73, 85 (1977). The "tied rationally" standard is employed to test whether a statute affecting Indians is within the constitutional power of Congress. The standard is made appropriate by the Court's changed approach to Indian political questions since the days of *Lone Wolf.* (*See* pp. 53-54, *supra.*)

Thus, in *Morton* v. *Mancari, supra,* the Court held that Congress might constitutionally confer a preference upon Indians to employment in the Bureau of Indian Affairs, reasoning that the preference statute was "rationally designed to further Indian self-government," an obviously permissible congressional Indian policy. 417 U.S. *supra* at 555. Similarly, in *Delaware Tribal Business Comm.* v. *Weeks, supra,* the Court upheld the constitutionality of a statute distributing a tribal judgment fund which excluded individuals who historically had been members of the tribe but had severed their tribal relations. 430 U.S. *supra* at 85-89. By contrast, since the constitutionality of the 1877 Act is not questioned in this case, only a purely judicial determination of just compensation for a legislative taking remains, and that is an issue to which the rational basis test has no application.

C. The Government's position would deny Indian tribes equal protection of the laws and leave present day tribes helpless against arbitrary congressional action by removing the constitutional requirement that recognized title lands can be taken only upon payment of just compensation.

The Government's proposed rule would deny equal protection of the law to Indian tribes seeking just

compensation for takings of their property.[64] To be sure, the Court has sustained legislation which classifies Indians differently in some respects from non-Indians, *e.g., Morton* v. *Mancari, supra,* even where the classification may operate to the detriment of an Indian in a particular circumstance. Thus, in *United States* v. *Antelope,* 430 U.S. 641 (1977), the Court upheld conviction of an Indian for first-degree murder of a non-Indian on an Indian reservation, by application of the felony-murder rule, under the Major Crimes Act, 18 U.S.C. 1151. Had the defendant been a non-Indian, the State of Idaho would have possessed jurisdiction to try and punish the offense, and the defendant could not have been convicted of first-degree murder because the State did not follow the felony-murder rule. Chief Justice Burger, speaking for a unanimous Court, rejected the claim that equal protection had been denied, emphasizing "that Indians indicted under the Major Crimes Act enjoy the same procedural benefits and privileges as all other persons within federal jurisdiction * * *. Respondents were, therefore, subjected *to the same body of law as any other individual, Indian or non-Indian,* charged with first degree murden in a federal enclave." (430 U.S. at 647-48;[65] emphasis supplied.)

In the present case, on the other hand, if the Government's rule were adopted, the "same body of law" would not apply to both Indian tribes and non-Indians

[64] Indian tribes are unquestionably covered by "the equal protection component of the Fifth Amendment." *Delaware Tribal Business Comm.* v. *Weeks,* 430 U.S. 74, 84 (1977).

[65] The Court continued that "[t]he Federal Government treated respondents in the same manner as all other persons within federal jurisdiction." (*Id.* at 649.)

claiming just compensation under the Fifth Amendment for a federal taking of their property. The federal "body of law" concerning just compensation would not be "evenhanded," and equal protection would be violated. (*Id.* at 649.) For contrary to the express purposes of the 1946 Indian Claims Commission Act, the Government's proposed standard would revive an unjustified "discrimination" between Indian tribes and all other property owners in suits against the United States.[66]

According to petitioner's argument, every eminent domain plaintiff, except an Indian tribe, is entitled to

[66] Until the Indian Claims Commission Act of 1946, Indian tribes generally could not sue the United States in the Court of Claims. (*See* p. 19, *supra.*) The 1946 Act's "primary objective" was to remove this "lingering discrimination." H. REP. No. 1466, 79th Cong., 1st Sess. (1945) p. 2. As the House Report states:

> The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal district courts, and secure a full, free, and fair hearing on his claims against the Government. * * * The only American citizen today who is denied such recourse to the courts is the Indian. By virtue of a statute adopted on March 3, 1863, at a time when a good many Indian tribes were engaged in hostilities against the Federal Government, all claims against the United States growing out of Indian treaties were barred from the jurisdiction of the Court of Claims, and from that day to this no Indians have been able to bring their disputes with the Federal Government before the Court of Claims without a special act of Congress. . . . (Footnotes omitted.)

(*Ibid.*) This central theme was repeated in numerous statements by the bill's sponsors and supporters on the floor of the House. *E.g.,* 92 CONG REC. 5312 (remarks of then-Congressman Henry Jackson), *id.* at 5318 (Congressman Stigler), 5319 (Congressman Rizley) (Congressman Case), 5320 (Congressman Stefan).

be paid the value of his property on the date of taking plus interest as a measure of just compensation. Indian tribes would receive neither, so long as the United States promised any beneficial consideration when the land was acquired. In that event, tribal claimants would be denied interest as a matter of course. In addition, since under the Government's view such disposition of Indian lands would not violate the just compensation clause, a tribal claim for fair market value would not arise under the Constitution so as to be within the jurisdiction of the Court of Claims pursuant to 28 U.S.C. § 1505. Accordingly, an Indian tribe paid something, but substantially less than fair market value, for lands taken by Congress today surely would be denied interest for delay in payment and probably would be denied any compensation above whatever Congress chooses to provide.[67] Contrary to established principles of law since *Monongahela Navigation Co.* v. *United States, supra,* Congress by statute could, in Indian cases only, "assume the right to determine what shall be the measure of compensation." 148 U.S. *supra* at 327.

The constitutionally-protected property rights of all modern day American Indian tribes thus are put at risk by the position of the Government in this case. To be sure, the facts here presented involve a taking over a century old in circumstances unlikely to recur today. But if the Court sustains the Government here, the result will be that Congress can take Indian lands and other property rights so long as it provides *any*

[67] The Court of Claims does not have jurisdiction over statutory breach of trust, unconscionable consideration or fair and honorable dealings claims. *Menominee Tribe of Indians* v. *United States,* —— Ct. Cl. ——, 607 F.2d 1335 (1979), petition for a writ of certiorari filed January 15, 1980 (No. 79-1103).

compensation or benefit to the tribe which Congress might consider reasonable—no matter how arbitrarily determined or how many millions of dollars short of fair value. Indian recognized title then would become little more than a tenancy by sufferance terminable at the pleasure of Congress—a result expressly rejected by the Court on repeated occasions.

CONCLUSION

The judgment in this case is large, but the precedents in eminent domain cases upon which the Sioux award rests are solid. Faced with the rule of *stare decisis,* the Government here asks this Court so to construe the Constitution as to exclude one class of property owners, Indian tribes, from full protection under the taking clause of the Fifth Amendment. In effect, the United States would encrust an exception upon the plain words of that amendment, making the language read, "nor shall private property be taken for public use, without just compensation, *unless the property belongs to an Indian tribe.*" To achieve this result, the Government advances the theory, freshly invented for this litigation, that, if Congress authorizes some payment to an Indian tribe, the constitutional requirement of just compensation is avoided, even though the payment made bears no relationship to the value of the property taken. This Court considered and rejected over 80 years ago a Government argument that Congress has the power to fix the amount of just compensation for lands taken by the United States. *Monongahela Navigation Co.* v. *United States,* 148 U.S. 312, 325 (1893).

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

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No. 79-639

In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

SIOUX NATION OF INDIANS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Although respondents acknowledge (Br. 86) Congress' plenary power to manage tribal lands for the benefit of the tribe, their primary contention (Br. 40-54, 86-91) is essentially that every valid exercise of this power constitutes a "taking" within the meaning of the Fifth Amendment to the extent that the legislation, with the benefit of hindsight, does not provide "just compensation" within the meaning of the Fifth Amendment. Respondents would require the courts to compare the actual dollar value of the legislation to the tribe, measured with the benefit of hindsight, with the dollar value of the assets transmuted and award the tribe the difference with interest. Under respondents' theory, for example, the public sale of portions of tribal land pursuant to an allotment act is a "taking" to the extent that the price paid to the tribe pursuant to the sale, even a price established by Congress after reasonable investigation, falls below judicially-established values.

Respondents' theory overlooks the special role of the United States in its management of tribal lands. When the United States, as guardian, disposes of such property, it is, in effect, a disposition by the tribe. Whatever may be the situation today, a century ago Indian tribes were deemed incapable of managing their lands in their best interests and that responsibility was exercised by the United States as the fee owner and pursuant to its power to deal with Indian affairs. Even respondents concede (Br. 85) that the United States must be able to manage tribal property to meet educational and other "essential needs" of the tribe. Because a valid exercise of this power is on behalf of the tribe and for what Congress believes is in the best interests of the tribe, it must be deemed a disposition by the tribe and is no more a taking than would be an identical action by the tribe itself, were it freed from historical disabilities. For this reason, the Court has given latitude to congressional judgments concerning tribal welfare and has sustained tribal taking claims only where the legislation could not reasonably be said to promote the welfare of the tribe (see our opening brief at 52-60).[1]

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[1]Contrary to respondents' characterization (Br. 44), we do not contend that any payment, however paltry, must be sustained by the courts as a valid exercise of the plenary power. The question in each case is whether a reasonable basis exists for concluding that the legislation promotes the welfare of the tribe. Normally, no reasonable basis would exist for concluding that a nominal payment for valuable lands promoted the welfare of the tribe.

Respondents are incorrect in their assertion (Br. 37) that the United States has never before argued "in any court" that the plenary power permits Congress to manage tribal property for the overall benefit of the tribe and is not limited solely to maintaining the net worth of the tribe's assets. This was our argument below (Br. 57, 60, 63, 64, 71). (We are lodging with the Clerk a copy of our brief below.) Moreover, this Court has long recognized that "as regards tribal property subject

Contrary to respondents' view (Br. 41-43), this does not provide "less protection" for tribal property than for privately owned property. The prevailing rule simply permits Congress to promote the welfare of the tribe in an essential way that would otherwise be unavailable.[2]

2. In the alternative, respondents adopt (Br. 55-81) the reasoning of the Court of Claims in this case. After essentially abandoning the view that the 1876 legislation was retribution for the Custer massacre (Br. 66-67), respondents argue (Br. 67-68) that "[t]he critical element in the legislative history of the 1876 Act is the fact that, in all of the debate over S. 590 and H.R. 3478, not one

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to the control of the United States as guardian of Indians, Congress may make such changes in the management and disposition *as it deems necessary to promote their welfare*." *Morrison* v. *Work*, 266 U.S. 481, 485 (1925) (emphasis added). See our opening brief at 67-71.

[2]Conceding (see Resp. Br. 7 n.4, 40-41) that the Sioux had "recognized title" to the Black Hills, a property interest protected by the Fifth Amendment (as distinguished from unrecognized or aboriginal title which may be extinguished without compensation, *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-278 (1955)), that title was nonetheless subject to management and disposition pursuant to valid exercises of Congress' plenary power. A valid exercise of the power does not, therefore, invade any "property" interest of the tribe within the meaning of the Fifth Amendment.

Nor was it necessary (see Resp. Br. 62) to establish a fund in order to provide fair consideration. The credit of the United States was unquestioned. Moreover, the open-ended commitment to provide food and rations and other material assistance for as long as needed was, in view of the plain inability of the Sioux to support themselves in the foreseeable future, of more value than would have been an interest-bearing fund of, say, $17 million.

member of Congress even mentioned, much less discussed, the value of Black Hills or whether subsistence would be a reasonable substitute for the Sioux Nation's property." The absence of any such remark, however, is hardly determinative of whether Congress intended to provide fair consideration. Our statement (Br. 8-37) sets forth the events leading up to the 1876-1877 legislation, the severe problems facing the Sioux Nation, the various solutions attempted, and the congressional deliberations over the matter. Viewing the legislation in its historical context and according Congress the deference it deserves, it is fair to conclude that the "consideration" referred to by Congress in the 1877 Act (A. 333) was intended as "fair consideration" and that explicit remarks to that effect by members of Congress would have added no more than was already evident in the circumstances.

3. A reply is necessary concerning certain erroneous factual claims made by respondents.

(a) Respondents are clearly wrong in asserting (Br. 15 n.11) that the 1876 Act affected payments still due under the 1868 Treaty. That Act affected only "subsistence" appropriations. See *1942 Sioux*, Finding 17 (A. 232). The court below made no finding to the contrary.

(b) Respondents imply (Br. 23 n.19, 79 n.60) that they were not compensated for their off-reservation hunting rights under the 1868 Treaty. This is incorrect. These same Sioux tribes were given full compensatory credit for those rights in other litigation before the Indian Claims Commission. See *Sioux Tribe* v. *United States*, 23 Ind. Cl. Comm. 358 (1970), and *Sioux Nation* v. *United States*, 24 Ind. Cl. Comm. 98 (1970). See also Defendant's Response to Plaintiffs' Supplemental Brief at 18-21, filed herein on December 14, 1978, a copy of which we are lodging with the Clerk.

(c) Contrary to respondents' assertion (Br. 75-76 & n.53), we do not base our contention that $43 to $57 million was spent on food and rations pursuant to the 1877 Act solely on a concession of Sioux counsel. The United States bases this contention (see our Br. at 36 n.25) on General Accounting Office records. It is nonetheless true that respondents' counsel admitted that $57 million had been paid to the Sioux under the provisions of the 1877 Act when the case was first tried before the Indian Claims Commission. See *Sioux Tribe* v. *United States*, 2 Ind. Cl. Comm. 646, 677 (1954). On appeal the Court of Claims in affirming the Commission's dismissal of the claim noted this concession. *Sioux Tribe* v. *United States*, 146 F. Supp. 229, 234 n.2 (Ct. Cl. 1956). Afterwards, the court vacated its affirmance and remanded the case for further evidence without expressly relieving respondents of this admission. The Commission then held that the United States was liable for a Fifth Amendment taking. See *Sioux Nation* v. *United States*, 33 Ind. Cl. Comm. 151, 216-218 (1974). However, before any trial on the offsets, *i.e.*, payments pursuant to the 1877 Act (see *id.* at 222), the Court of Claims reversed, on *res judicata* grounds, the holding that there had been a taking. *United States* v. *Sioux Nation*, 207 Ct. Cl. 234 (1975). In the interim, Congress enacted the legislation denying "food, rations or provisions" as allowable offsets. Act of Oct. 27, 1974, Pub. L. No. 93-494, 88 Stat. 1500. This virtually eliminated the offset claims because there were few payments under the 1877 Act not in the "food rations and provisions" category. To move the case to completion, the United States presented only abbreviated accounting evidence concerning the allowable items. These isolated items were disallowed as inadequately substantiated. In sum, the United States has had no real

opportunity to establish the full amount of food and rations paid to the Sioux under the 1877 Act, the value of which we contend exceeds $43 million.

CONCLUSION

For these reasons, as well as those stated in our opening brief, the judgment of the Court of Claims should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
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MOTION AND BRIEF ON BEHALF OF AMICUS CURIAE INDIAN LAW RESOURCE CENTER

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1976

No. 79-639

UNITED STATES OF AMERICA, Petitioner,

v.

SIOUX NATION OF INDIANS, et al.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF CLAIMS

MOTION FOR LEAVE TO FILE BRIEF
.S AMICUS CURIAE

The Indian Law Resource Center hereby moves the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amicus curiae in opposition to petitioner's effort to reverse in part the judgment below and in support of a ruling by this Court which would accord full and equal constitutional protection to all Indian interests in land. This motion and the attached brief are timely filed within the time allowed for filing of respondent's brief on the merits. Counsel for respondent has declined to consent to this filing. Petitioner, the United States, has given its written consent.

The Indian Law Resource Center is a non-profit charitable and educational organization. The Center provides legal assistance and representation to Indian people and Indian governments from various parts of the United States in a broad range of matters. The principal focus of its litigation and educational work is on the protection and support of Indian self-government. The Center attorneys regularly work and consult with many Indian leaders and Indian rights attorneys who share the Center's interest in advocating full protection for Indian interests under the Constitution and international law.

The proposed amicus brief addresses only the issue of what legal standard shall apply to the protection of Indian interests in land. No views are expressed on any other aspect of the case. The rule of law which this Court will announce on this crucial issue will have broad ramifications in United States Indian affairs. This Court's ruling will likely affect the rights of Indian peoples to the 51 million acres of land they presently hold as well as their claims pertaining to land and their legal rights in general.

The legal arguments in favor of constitutional and international law protection which are advanced by amicus are not addressed by the parties. In the view of the Indian Law Resource Center, many others providing legal assistance to Indians today, and a growing number of Indian people, these arguments are of fundamental importance and should, it is respectfully urged, be given this Court's careful consideration.

For these reasons, the Indian Law Resource Center moves that the Court grant it leave to file the annexed brief as amicus curiae.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of the Indian Law Resource Center in this case arises out of our efforts to protect and advance the constitutional and legal rights of American Indians. The Center and its legal staff share this interest with other Indian rights organizations, Indian people, and non-Indians concerned about the rights of Indians. Ranked at the bottom of almost every measure of social condition, Indians need the ameliorative protection of the constitutional and legal rights which have served the interests of all other groups and individuals.

This amicus brief does not address all of the issues presented by this case. The interest of the Indian Law Resource Center does not extend to the monetary award or the attorneys's fees. The only issue which we address pertains to the law governing the relationship between the United States and the interests of Indian peoples in their lands. A fresh ruling by this Court on that important issue will have dramatic impact on United States-Indian relations for the forseeable future.

We are concerned that nothing less than a full measure of constitutional and legal protection be accorded all Indian interests. If justice is to be done, this Court must establish that the interests of Indian peoples are included squarely within the Constitution's fundamental command that all persons, regardless of race, ethnic origin or nationality, are entitled to equal protection and due process of law.

The Interests of Indian Peoples In Their Lands Are Entitled To The Full And Equal Protection Of The Fifth Amendment To The Constitution And Of International Law.

Introduction

At the core of the government's argument in the present case is the position that Indians and their lands should not be accorded the complete and equal protection of the Fifth Amendment. The government asks, once again, for this Court to deny Indians constitutional protection and to acknowledge the "plenary power" of the political branches of government. Instead of addressing the scope of Indian land rights within the context of accepted constitutional and legal norms, the government asks this Court to defer to the political authorities by rendering a decision which would in effect give unfettered power to Congress to dispose of Indian interests in land. Should the government's argument prevail, this Court would signal that Indian peoples must resign themselves to the second-class legal status which they have struggled to overcome since the founding of our nation.

The concept of constitutionally protected rights for Indian tribes or nations is a relatively recent development in United States law. For most of the history of this nation, Indians have been subject to the political and military authority of the executive and legislative branches of government. The judiciary has seldom been forceful in the exercise of its constitutional responsibility to provide a firm check and balance in Indian affairs. The plight of Indian peoples today is attributable in part to this past failure of the United States judiciary to provide the same unflinching constitutional protections to Indian interests which it has accorded all

others.

This Court should now fix the future course of federal Indian law by applying constitutional standards which will check the political winds which have in cycles eroded the land rights of Indian peoples. The present case provides an opportunity for the Court to honor the principle first eloquently expressed by Chief Justice John Marshall that law, not political expediency, shall govern how this nation deals with Indian peoples.

An examination of the cases which are most significant to the Court's review shows that the law on which the government relies is fatally infected with racially prejudiced assumptions of the past, is inconsistent with Fifth Amendment law as it has evolved to protect a broad range of interests of all other classes and individuals, and is violative of the rights of indigenous peoples as established in international law of the post-colonial era.

The Precedents On Which The Government Relies In Its Argument In Favor Of Broad, Extra-Constitutional Congressional Power Over Indian Interests In Land Do Not Withstand Close Scrutiny Under Present Constitutional Law And International Law.

1. The Cherokee Decisions of the John Marshall Court

The early Indian rights decisions of Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823), Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) and Worcester v. Georgia 31 U.S. (6 Pet.) 515 (1832) were cast in an era of rapidly increasing United States military and economic power. In the course of this development it became apparent that this young nation had not clearly resolved whether its Indian affairs would be governed by law or by

political power. The Cherokee cases are most illustrative of the early legal contests over that issue. These Marshall Court decisions provide helpful direction to the present Court's consideration of this case, the most recent manifestation of the continuing struggle between law and politics in Indian affairs.

In the early 1800's the legal rights of the Cherokees were threatened with extinction by the State of Georgia and the administration of President Andrew Jackson who pressed the cruel policy of Indian Removal against them.* The question of the nature of Cherokee legal interests in their lands was brought to this Court at a time when Jackson supported Georgia and the nullificationists in their efforts to seize all Cherokee lands.

The John Marshall Court squarely faced the enormous political pressures which were brought against the Cherokees and the Court, and it upheld the rule of law. The Court's opinions in favor of Cherokee rights rely heavily on the Constitution and on international law as expressed by Emer de Vattel and other leading scholars of that time. Although Marshall anticipated that his decision in the Worcester case would lead to a major confrontation with the nullitications and Jacksonians who stood fast against Indian rights,

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*Grant Foreman, Indian Removal (1932).

the Court did not shrink from its judicial duty.* The Marshall decision upheld Indian treaty rights and recognized Indian rights to their homelands.

> [T]he several Indian nations [exist] as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having the right to all the lands within those boundaries.
>
> 31 U.S. (6 Pet.) 556

The Marshall Court rejected the view, expressed in a separate opinion of Justice Johnson in the Cherokee Nation case, that Indians were a conquered subject people who had no ownership rights to the lands they occupied, that they were a sort of

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*Although President Jackson reportedly threatened not to enforce the Marshall Court's Worcester decision, the final legal confrontation between the Court and the President never materialized. The pro-federalist missionaries and their attorney, William Wirt, quietly arranged to accept a pardon from the Georgia governor after President Jackson reversed his position and publicly opposed nullification. The case was thereby mooted and the Cherokees were left to suffer the infamous "Trail of Tears" without further judicial protection.

Burke, "The Cherokee Cases: A Study in Law, Politics and Morality," 21 Stan. L. Rev. 500 (1969); The William Wirt Papers (Library of Congress Manuscript Collection).

tenant-at-will who were only temporarily secured in their lands pending further disposition of their rights by Congress. 30 U.S. (5 Pet.) at 27.

Viewed in its historical context, the Marshall Court's decision was a courageous and humanitarian effort to bring the governance of Indian affairs within the protection of high legal principles.

In his Cherokee opinions John Marshall did, however, adopt much of the prevailing racial theory of his time. Laced through the Court's opinions are many characterizations of Indian peoples which by today's standards are demeaning, racially prejudiced and unspeakable. The assumption of white, European racial superiority similarly infected the writings of Emer de Vattel and other great international legal theorists of the time.* The enlightened, "scientific" belief of the early 19th Century was that Indians and other non-white "natives" or "savages", were dependent "lower races" who might, possibly, through extensive training, become civilized like whites. Marshall stated that belief in Cherokee Nation:

> [Indians] are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> 30 U.S. (5 Pet.) 16

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*Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns (Washington, 1916), translated from original edition of 1758 by Charles E. Fenwick.

The guardian-ward relationship urged on this Court by the government in the present case has grown from this dictum. These same words have been echoed in many court decisions and in the legislative history of every confiscatory act passed by Congress to the detriment of Indians. As Felix Cohen* wrote, the concept of Indians as wards subject to Congressional power "is utilized in two general ways: (1) as a justification for congressional legislation in matters ordinarily within the exclusive control of the states, and (2) as a justification for federal legislation which would be considered 'confiscatory' if applied to non-Indians." Cohen, Handbook of Federal Indian Law (1942), p. 170. Every taking from Indians has been couched in terms of moral duty, for the "best interest" of the United States' Indian "wards".

By the middle of the 19th Century this idea of guardianship or trusteeship, with its emphasis on the non-competent status of the "natives", became the dominant concept in the law of the French and English colonial empires as well. The mother country's trusteeship duty to civilize and its concomitant power to limit the legal rights of its colonial subjects was the governing principle of European empires until after World War I. See, Imperialism, Philip D. Curtin, ed. (N.Y. 1971).

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*Justice Felix Frankfurter described Cohen's work as "an acknowledged guide for the Supreme Court in Indian litigation." F. Frankfurter, Of Law and Life and Other Things That Matter, 143 (1967). Among Cohen's last writings is "Indian Wardship: The Twilight of a Myth," The American Indian, Vol. VI, No. 4 (Summer 1953), pp. 8-14.

The government's argument in this case, that Indian peoples are "incapable wards", has evolved over time in tandem with this unfortunate, imperial development. It is most remarkable that the government urges again on this court a rule based on this demeaning relationship, a never-ending racial pupilage. The proposed rule would continue to justify extra-constitutional extinguishment of Indian interests in land and would leave Indians without the most important legal protections afforded to all others.

2. Lone Wolf v. Hitchcock

Lone Wolf v. Hitchcock 187 U.S. 553 (1903) was decided during the Allotment era, one of the most tragic periods of United States Indian affairs. Under the General Allotment Act of 1887, Congress had determined to "break up the tribal mass," to end Indian communal ownership of lands by forceably turning Indian families into small farmers with designated 160 acre allotments, and to thereby lead Indians to a higher level of civilization. During this era, which lasted until about 1930, two thirds of all Indian lands were taken. Designated as "surplus" lands held in "trust" by the United States, these lands were transferred to white settlers.*

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*See, e.g., D.S. Otis, History of the Allotment Policy, Hearings on H.R. 7902 Before the House Comm. on Indian Affairs, 73d Cong., 2d Sess., pt. 9 (1934); Wilcomb E. Washburn, The Assualt on Indian Tribalism: The General Allotment Act of 1887 (1975).

Acting in what it considered at the turn of the Century to be the best interest of Indians, Congress disposed of Indian lands, Indian jurisdiction, Indian religion and culture as it saw fit, without significant interference from the judiciary. At that time in history, this United States policy was in accord with the policies of most governments of America and Europe. Such interference with the affairs of non-white peoples was widely believed to be completely consistent with Christian duty and the "white man's burden".

A review of the text of the Lone Wolf opinion and its historical context gives great support to the conclusion expressed in the concurring opinion below of Judge Nichols:

> The day Lone Wolf was handed down, January 5, 1903, might be called one of the blackest days in the history of the American Indian, the Indians' Dred Scott decision. (p.40)

The Lone Wolf opinion gave free reign over Indian affairs to the political branches of government. Its effect was to make hollow pronouncements of the high principles of the John Marshall Court. As the dissent below states,

> The sense of the opinion seems to be that Indian tribal property is simply not protected by the fifth amendment. It may be that the thought then was that due process protects only "persons" and "private property" and that Indian tribes were not "persons" and Indian tribal property, owned communally, was not private property.
>
> ...
>
> Lone Wolf held that it was within Congress' constitutional power to dispose of tribal property without regard to good faith or the amount of compensation. (p. 53)

Without conceding this analysis of the holding of Lone Wolf, it is fair to state that the sense of that opinion is diametrically opposed to constitutional protection and, indeed, to almost any other legal protection for Indian interests in land. The linchpin of the Lone Wolf case is the political question doctrine. By deferring to Congress and the President, the Lone Wolf Court assured that political expedience rather than law would be paramount in United States Indian affairs.

Lone Wolf must be read today in the light of the Court's evolving standards of fairness and constitutional protection for all. The decision cannot today support the broad denial of Indian legal rights which the government urges.

3. Tee-Hit-Ton Indians v. United States

During the fifty years after Lone Wolf, several decisions involving Indian land rights were rendered by this Court, usually in litigation authorized by special jurisdictional acts which gave some limited relief to Indian peoples who were otherwise deprived of access to the courts. As noted below, these precedents are difficult to harmonize. But throughout this era the dominant legal theme remained the "sense" of Lone Wolf, the plenary power of Congress over Indian land rights.

This theme was most forcefully stated in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955). This decision, rendered at the height of the Termination era, another infamous period of

anti-Indian legislation*, established that no constitutional protection attached to "Indian title" or "aboriginal title" lands. Only "recognized title" lands -- lands expressly acknowledged by Congress to be permanent Indian lands -- would receive any Fifth Amendment protection. Under the extinguishment doctrine of Tee-Hit-Ton, most Indian interests in lands became subject to arbitrary, uncompensated extinguishment by Congress. Indians living where their ancestors have lived for a thousand years would, under Tee-Hit-Ton, be deemed "no more than tenants at will of the Government." Healing v. Jones, 210 F.Supp. 125, 138 (D.Ariz. 1962), aff'd 373 U.S. 758 (1963). The minority view in the Cherokee cases seemed to prevail.

In considering the historical context of the Tee-Hit-Ton case it is instructive to recall that in 1955 the Court had just begun the monumental task of removing racial prejudice from the body of United States law. Brown v. Board of Education 347 U.S. 483 (1954). The Tee-Hit-Ton decision was an anomaly in the early stages of a legal revolution which has made due process and equal protection a present reality for millions who were previously deprived of these fundamental rights.

It is also instructive to note that Tee-Hit-Ton was decided in the twilight of the colonial era, at the inception of the post-World War II independence movement which has changed the political complexion of the world. Within a few decades one billion "colonial subjects", "natives", "aborigines" and "wards" from the "lower races" became citizens entitled to self-determination within their

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*See, e.g., Wilkinson & Biggs, "The Evolution of the Termination Policy," 5 Am. Ind. L. Rev. 139 (1977).

own nations. This rapid transformation of political relationships has been accompanied by a similarly rapid change of international law. The post-colonial world community has emphatically renounced the legal theories of Vattel and the other 18th and 19th Century scholars who gave legal sanction to the subjugation of one people by another. The legal right of self-determination, including the right to full and equal protection of the land rights of indigenous people, has supplanted the colonial trusteeship in international law.* The governing international law of

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*The United States is bound to recognize and respect the right of every individual and group to own property under article 17(1) of the Universal Declaration of Human Rights; article 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, which the President signed on September 28, 1966 and submitted to the Senate for ratification on February 23, 1978; and article 21(1) of the American Convention on Human Rights, which the President signed on June 1, 1977 and submitted to the Senate for ratification on February 23, 1978. The United States is bound to recognize and respect the right of every individual to be free from arbitrary deprivation of property without compensation under article 17(2) of the Universal Declaration of Human Rights and article 21(2) of the American Convention on Human Rights. The United States has an international legal obligation to refrain from engaging in acts or practices of racial discrimination against persons or groups of persons under article 2 of the International Convention on the Elimination of All Forms of Racial Discrimination; article 1 of the United Nations Charter; article 26 of the International Covenant on Civil and Political Rights, which the President signed on October 5, 1977 and submitted to the Senate for ratification on

the present era is inconsistent with the Indian wardship announced in the Cherokee cases and with the denial of fair, equal legal protection seemingly approved by Lone Wolf and Tee-Hit-Ton. To the extent that those decisions relied explicitly or implicitly on the science and legal prejudice of colonial era law, they are legally insupportable today.

4. Three Affiliated Tribes of the Fort Berthold Reservation v. United States

The Fort Berthold case, 390 F.2d 686 (C.Cl. 1968), was an effort of the Court of Claims to reconcile the colonial era cases on "natives'" rights with latter 20th Century concepts of due

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(continued from previous page) February 23, 1978; and Basket I, principle VII of the Helsinki Final Act. The United States is bound to recognize and respect the right of every individual to receive equal treatment and protection under the law without discrimination as to race under article 55 of the United Nations Charter; article 26 of the International Covenant on Civil and Political Rights; article 7 of the Universal Declaration of Human Rights; Basket I, principle VII of the Helsinki Final Act; and article 24 of the American Convention on Human Rights. It is also noteworthy for the present discussion that the United Nations in 1960 expressly declared an end to the "pupilage" or trusteeship justification of European colonial empire:

> Inadequacy of political, economic, social, or educational preparedness should never serve as a pretext for delaying independence.

Declaration of the U.N. General Assembly on the Granting of Independence to Colonial Countries and Territories (December 14, 1960).

process, equal protection and fundamental fairness. That effort to reconcile these disparate views fails, and, as the dissent below states, the proposed Fort Berthold standard "makes a mockery out of the Fifth Amendment protections it purports to extend to the tribes, making its effectiveness depend on an abstract, insubstantial finding." (p. 62)

The Fort Berthold rule continues to accord only the most limited and modified constitutional rights to Indian interests in land. The political branches of the government remain largely unfettered in their control over Indian land, free to extinguish Indian interests without any but the most superficial judicial control. Under Fort Berthold, the Fifth Amendment right to just compensation is an abridged right which is ultimately subject to broad control by Congress. By simply making an "objective" record of good faith intentions to act in the best interest of Indians, Congress remains free to take Indian interests in land and to deny the just compensation to which all others are entitled. The Fort Berthold rule leaves Indian interests ripe for abuse, without sufficient judicial protection.

It is impossible to square the Fort Berthold rule with the many recent decisions of this Court governing Fifth Amendment rights. It is scarcely conceivable that the interests of Indians in land, including their interest in the 51 million acres* of lands they hold, would not today, after careful examination, be deemed property interests fully protected by due process and equal protection. It would be inconsistent and arbitrary to deny Indian

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*T. Taylor, The States and Their Indian Citizens, U.S. Dept. of the Interior (1972) p. 176.

peoples the same constitutional protections which this Court has seen fit to extend to all other groups and individuals, including aliens. Rapidly evolving notions of justice, with parallel developments in the United States constitutional law and international law, require that this Court make a fresh examination of the tenets governing Indian land law. Only those principles consistent with the highest constitutional ideals should be permitted to stand.

Conclusion

In Delaware Tribal Business Committee v. Weeks 430 U.S. 73 (1977) this Court rejected the government's argument for "plenary power" and held that "the power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." In the present case the government again asks for this Court's approval of virtually plenary political control over Indian interests in land. As in the Delaware case, this Court should deny the government's request and reaffirm the supremacy of law and the Constitution in United States Indian affairs.

Although amicus argues that this Court should rule that all Indian interests in land are fully and equally protected by the Fifth Amendment to the constitution, the Court need not decide the constitutional issues. The Court may prefer to decide on other grounds and wait to address the Fifth Amendment issues in a subsequent case where the parties have made a complete record on the constitutional questions. However, should the Court be inclined to review the central constitutional issues and to re-examine the Marshall Court decisions, Lone Wolf, Tee-Hit-Ton, Fort Berthold, and their progeny, we respectfully urge the Court to accord the highest standard of constitutional protection to all Indian interests

in land. This Court should ensure that Indian interests receive the same Fifth Amendment protections which are guaranteed to all others.

Respectfully submitted,

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